89-708

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL COPORATION, et al.

Debtors

MIAMI CENTER LIMITED PARTNERSHIP,

Petitioner,

v.

THE BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT M. MUSSELMAN
413 Seventh Street, N.E.
Charlottesville, VA 22901
Telephone (804) 977-4500
Attorney for Miami Center Limited Partnership

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Does the Fifth Amendment to the Constitution preclude the Bankruptcy Court from requiring a Lessor not in reorganization to sell property without consent to a debtor Lessee in default or its successor in interest in accordance with the provisions of a substantially consummated plan of reorganization?

2) Does the administration of the bankruptcy laws preclude imposing liability upon a debtor Lessee's estate for money expended in disposing of a secured creditor's collateral free and clear of leases and liens in accordance with the provisions of a confirmed plan of reorganization?

3) Does the due process clause of the Fifth Amendment of the Constitution apply in bankruptcy proceedings so that an individual not in bankruptcy is not bound by the results of litigation to which he was not a party?

PARTIES TO THE PROCEEDINGS

Petitioner Miami Center Limited Partnership was an Appellant before the United States Court of Appeals for the Eleventh Circuit. The Respondent is the Bank of New York, the Appellee below. An interested party to the proceedings is Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust.

Miami Center Joint Venture (hereinafter referred to as "MCJV"), a general partnership, formed in accordance with the laws of the State of Florida in 1981, consisting solely of Olympia & York Florida Equity Corp. and Theodore B. Gould, is an additional interested party.

Petitioner Miami Center Limited Partnership (hereinafter referred to as "MCLP"), a debtor in the Chapter 11 proceedings below, is a limited partnership, formed in accordance with the laws of the State of Florida in 1979, consisting of forty (40) units of limited partnership interests, owned by twenty-five (25) separate individuals. The general partners are Theodore B. Gould and the Miami Center Corporation, both of whom were also debtors in the Chapter 11 proceedings below, having each filed a separate petition for reorganization.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

CHRONOLOLGY OF TRANSACTIONS 6

REASONS FOR GRANTING THE WRIT 17

I. The Bankruptcy Court Lacked The Authority To Require A Lessor Not In Reorganization To Convey Title To Leased Property To A Debtor-Lessee Already In Default Or Its Successor In Interest Under The Bankruptcy Code, Applicable Nonbankruptcy Laws, The Common Law Of The State Of Florida, And The Fifth Amendment Taking Clause Of The United States Constitution 17

II. The Eleventh Circuit's Reliance Upon Its Prior "Mootness" Ruling, 838 F.2d 1547 (11th Cir. 1988), Dismissing The Debtors' Appeal Of The Confirmation Order, For The Purpose Of Granting Authority To The Bankruptcy Court To Require The Conveyance Of Title Of The Property Of A Nondebtor, Is Inconsistent With The Due Process Requirement Of The Fifth Amendment Of The Constitution That One Is Not Bound By The Judgment Of The Court Adversely Affecting His Interests In Litigation In Which He Is Not A Party And The Mootness Doctrine 24

CONCLUSION 30

APPENDICES are bound herewith and contain a separate table of contents ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 29

Calloway v. Benton, 336 U.S. 132 (1949) 22, 23

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 21, 23

Hanson v. Denckla, 357 U.S. 235 (1958) 26

In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983) 21

In re Holywell, 75 B.R. 793 (Bankr. S.D. Fla. 1987) 3

In re Pioneer Ford Sales, Inc., 729 F.2d 27 (1st Cir. 1984) 21

Martin v. Wilks, ___ S.Ct. ___ (June 12, 1989) 3, 26

Miami Center Limited Partnership v. The Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 3

Oil Worker's Union v. Missouri, 361 U.S. 363 (1960) 30

R. T. Vanderbilt Co. v. OSHA Rev. Comm., 708 F.2d 570 (11th Cir. 1983) 25

Theatre Holding Corporation v. Mauro, 681 F.2d 102 (2nd Cir. 1982) 20

Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937) 23

Vandervalk v. Brewer, 436 So.2d 1083 (Fla. 3rd DCA 1983) 21

Western Union Telegraph Co. v. Commonwealth of Pennsylvania, 368 U.S. 71 (1961) 26

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES:

Constitution of the United States, Amendment V 17, 23, 24, 30

Bankruptcy Reform Act of 1978:

11 U.S.C. § 361 9

11 U.S.C. § 363 ..... 4, 17, 18, 19, 23, 26

11 U.S.C. § 365 ..... 6, 13, 15, 18, 19, 20, 28, 29

11 U.S.C. § 502 28

11 U.S.C. § 503 28

11 U.S.C. § 506 ..... 19, 29

11 U.S.C. § 541 5

11 U.S.C. § 1101 28

11 U.S.C. § 1104 11

11 U.S.C. § 1122 25

11 U.S.C. § 1123 ..... 9, 14, 18, 19, 25

11 U.S.C. § 1129 ..... 13, 17, 25

11 U.S.C. § 1141(a) 25

28 U.S.C. § 1254 2

28 U.S.C. § 1334 27

RULES OF COURT:

Federal Rules of Civil Procedure:

Rule 19 3

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY:

House Report No. 95-595, 95th Cong. 1st Sess. 345 19

U.S. Code Cong. & Adm. News, 1978, p. 6451 29

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Miami Center Limited Partnership respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on July 31, 1989, denying the Petition For Rehearing filed by Petitioner following that court's original opinion of affirmance entered on June 6, 1989.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's opinions entered on July 31, 1989, are reprinted in the Appendix hereto ("App") at App. 1 and App. 3. The original opinion of the Court of Appeals below entered on June 6, 1989, is reprinted at App. 5. The opinions of the lower courts, which are the subject of the appeal below and relevant to the Court's consideration of this Petition are also reprinted in the Appendix and, where such opinions have been reported, the citation is indicated in the Table of Contents to the Appendix.

STATEMENT OF JURISDICTION

Petitioner filed an appeal to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, entered on April 4, 1988, App. 9, which affirmed an order of the United States Bankruptcy Court for that district, entered on May 8, 1987, App. 19, allowing Miami Center Joint Venture's ("MCJV") claim, as the Lessor of unexpired personal property leases in default in the amount of *$14,557,754* as of April 30, 1987, against the bankrupt estate of the debtor Lessee Miami Center Limited Partnership ("MCLP").

The amount of MCJV's claim allowed by the Bankruptcy Court included the leased property's fair market value in the

amount of *$4,986,900*, and interest of *$2,230,439* as carrying costs for nonpayment of such claim for the period following the Plan's Effective Date on October 10, 1985.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves two unexpired leases of personal property (principally the furnishings of a 35-story hotel) which were used in the real estate development known as the Miami Center, the owner of which filed a petition for reorganization under Chapter 11 of the Bankruptcy Code as a result of foreclosure action by the construction lender, the Bank of New York, following the cancellation of permanent loan commitments issued by other institutions. Both unexpired leases of personal property were in default prior to the date upon which the debtor-lessee filed its Chapter 11 petition.

The administration of the bankruptcy laws require a determination of (1) whether a bankruptcy court could compel a lessor *not* in reorganization to sell leased property, even with a money satisfaction, (2) whether liability should be imposed upon the debtor's estate for money expended in disposing of a secured creditor's collateral free and clear of leases, and (3) to what extent a nondebtor lessor is bound by a judgment in appellate proceedings of a confirmation order to which it was not a party.

The Court of Appeals concluded that the conveyance of title to the leased furniture, fixtures, and equipment " . . . was part of the confirmed Plan of Reorganization" and therefore not subject to modification, since the plan was substantially consummated. This ruling was based on the following findings of fact:

> " . . . Under the terms of the plan, a purchaser designated by the Bank was to buy the Miami Center Project for $255.6 million. This price included the purchase of the FF&E [furniture, fixtures, and equipment]. The plan required the liquidating trustee to take any action necessary, including the exercise of the purchase options in the FF&E leases, to obtain title to the FF&E so that the trustee could convey title to the FF&E to the purchaser at

closing. The plan also provided that the total price to the paid by the purchaser would be reduced by the value of the FF&E if for some reason the liquidating trustee could not obtain title to the FF&E." App. 6.

"The bankruptcy court confirmed the plan and on October 10, 1985, all of the debtors' property was transferred to the liquidating trustee. The trustee then delivered title to the FF&E to the purchaser." App. 7.

"MCJV filed the claim at issue against the trustee, as successor in interest to MCLP, for the unpaid rent and purchase price of the . . . leases." App. 7.

"The court allowed the claim, ruling that (1) MCLP exercised the purchase option on or before October 10, 1985 [sic], (2) title to the FF&E passed to the liquidating trustee on October 10, 1985, (3) the trustee then sold the FF&E to the purchaser as part of the $255.6 million sale of the Miami Center Project. *In re Holywell*, 75 B.R. 793 (Bankr. S.D. Fla. 1987)." App. 7.

"The court calculatd the amount due MCJV to be $14,557,754. This figure consisted of $6,112,318 in unpaid rent from May 1981 until October 10, 1985, $2,478,818 in interest on the past due rent, $4,986,900 for the purchase option price, and $979,718 in interest on the purchase option price. Id. at 796." App. 7.

While the issues involved here were raised before the Eleventh Circuit on separate petitions for rehearing filed by both MCJV and the Petitioner, the Court denied both of these petitions, in spite of the fact that Rule 19 of the Federal Rules of Civil Procedure and the very recent ruling of this Court in the case of *Martin v. Wilks* (June 12, 1989) precluded the conclusion that the Eleventh Circuit's ruling in *Miami Center Limited Partnership, et al. v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988) dismissing the debtor's appeal of the Bankruptcy Court's confirmation order on the grounds of mootness was binding and could adversely affect MCJV's

interests since it was not a party in that case. Likewise, the denial of rehearing overlooked the ruling of the District Court that the Bankruptcy Court's confirmation order must be *reversed* because "the plan, as structured, is not fair and equitable to the class 7 creditor [MCJV]." App. 72-74.

The other Petition for Rehearing, filed by MCLP, had been based on five points, namely, first that the Bankruptcy Court's decision determining the documents in question to be "true leases" had by its terms necessarily established that the trustee did not obtain title to the leased furniture, fixtures, and equipment, and therefore could not sell them without MCJV's permission. 11 U.S.C. Section 363(f). Likewise, the modifications to the Contract of Sale made *ex parte* and post-confirmation established that the trustee could not have "delivered title to the FF&E to the purchaser."[1]

Secondly, it is not disputed that the purchase option contained in these leases had not been exercised prior to October 10, 1985, and that the defaults in these leases had not been cured at that time. Hence, the terms of the leases which forbade assignment without the Lessor's consent established that both on October 10, 1985, and thereafter, MCLP had no remaining right to exercise these purchase options and was

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[1] The modified Contract of Sale, attached as Exhibit A to the Plan of Reorganization, provided in part as follows:

> "25. The Purchaser is fully familiar with the status of the record in the bankruptcy proceedings and the property rights vested in the Seller in accordance with the United States Bankruptcy Code and the Plan, and thereby said Purchaser recognizes that the Seller, Miami Center Liquidating Trust, can deliver, in accordance with this Agreement, only such title, items, chattels, and matters that it has received by operation of law from the Debtors and Debtors in Possession, and that this Agreement is governed by said limitations."

required by the terms of the leases to return the equipment to the Lessor upon termination of the leases.[2]

Thirdly, under the terms of the Plan, nothing passed to the Trustee except property of the *Debtors* within the meaning of Section 541(a) of the Code. Since MCLP never exercised its purchase options, and had lost its right to do so at the time of the filing of its petition, as it was already in default, the Bankruptcy Court had no basis to allow the purchase price of the FF&E as a claim against MCLP's estate, since the Lessor had not consented to a sale in accordance with the plan's provisions.

Fourthly, the common law principle that a lessee who fails to perform the covenants of a lease within the time prescribed *loses* an included purchase option binds the Bankruptcy Court just as it binds any other court of competent jurisdiction. Thus, as a matter of law, neither the debtor nor the court was in a position to exercise these purchase options.

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[2] The Trustee has specifically denied conveying title of the leased FF&E to the Purchaser on October 10, 1985, as follows:

> "What the Liquidating Trustee delivered to the bank was possession."
>
> "Title to the FF&E . . . remained in MCJV and did not pass to any other party."
>
> "The Miami Center Liquidating Trust did not acquire any rights in connection with the exercise of the purchase option since the leases involved were required to be in good standing before the purchase option could be exercised."
>
> "The MCJV FF&E leases as a matter of law stood rejected."
>
> "Title never did pass to MCLP or the Liquidating Trustee."
>
> "The status of the record, the provisions of the Code, and the amendments to the sale contract attached to the Confirmed Plan preclude the conclusion that tile passed to MCLP or the Liquidating Trustee at any time."

Liquidating Trustee's Post-Hearing Summary re MCJV Claim, April 23, 1987, p. 1-7.

Finally, Section 365 of the Bankruptcy Code (11 U.S.C. Section 365) sets forth in explicit terms the only procedures by which a lease in default can be assumed. Among these conditions are the requirements that the assumption must be *before* confirmation and that the default must be cured promptly. There was no assumption before confirmation and, under the literal words of the plan, the leases were rejected upon confirmation.[3] Further, there has been no "prompt cure", since four years have now elapsed and not one cent of the default has been paid.

Accordingly, Petitioner contends that the rulings in question are not in conformity with the law and should now be reviewed and reversed.

CHRONOLOGY OF TRANSACTIONS

The transaction underlying the case *sub judice* was agreements formed in 1981 when the Miami Center Joint Venture and the Miami Center Limited Partnership entered into two separate leases of personal property, referred to as the "Category 'A' and 'B' Leases," for use in the Miami Center, a large commercial real estate development in Miami, Florida. The Bank of New York reviewed and approved the terms of both of these leases in advance. In conjunction with these leases, on May 14, 1981, MCLP granted in a *Security Agreement*, to The Bank of New York as the construction lender, a continuing security interest in all of *its* right, title, and interest as lessee in the lease agreements with MCJV, as lessor. This

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[3] Article XI, *Executory Contracts*, Para. B. of the Plan provides as follows:

> Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the confirmation Order in accordance with 11 U.S.C. section 365, or paragraph A of this Article all executory contracts and unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation Order.

included the rights and remedies of a secured party under the Uniform Commercial Code to succeed to the debtor's interest as lessee.

Simultaneously, through a *Subordination Agreement*, The Bank of New York as mortgagee, *subordinated* in whole to MCJV the lien and effect of its mortgages on the Miami Center with respect to the Category "B" lease. Through the same Agreement, the Bank *limited* the extent of the lien and effect of its mortgages on the Miami Center with respect to the Category "A" Lease to the sum of $89,500,000.

This limitation was subject to MCJV's agreement that, in the event of a default under the leases, it would not exercise its rights or remedies unless the Bank did not cure the failure or failures which constituted the default within thirty days of its notification to MCJV of its intent to cure such defaults, and limiting the Bank's remedy, as mortgagee, in the event of any foreclosure of MCLP's interest, to the continuance of the leases in full force and effect.

The closing documents included UCC-1 forms *filed by the Bank*, which recorded the subordination of its liens, as described above, to the Miami Center Joint Venture's interests in the "Category A & B Leases." App. 101.

In response to the foreclosure proceedings thereafter initiated by The Bank of New York on the Miami Center, as a result of the cancellation of the commitments for the permanent loans, MCLP filed a petition for relief in accordance with Chapter 11 of the United States Bankruptcy Code on *August 22, 1984*.

On *February 26, 1985*, The Bank of New York filed a proposed consolidated plan of reorganization on behalf of the debtors. This plan was subsequently modified, first by stipulation and addenda with the Unsecured Creditors' Committees and later by a Second Amendment. The Plan, as so amended, provided in relevant part as follows:

> Article I, *Definitions*:
>
> "*Claim*: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any

> of the Debtors . . . *as of their respective Petition Dates* as described in Section 101(a) of the Code." [Emphasis added]
>
> . . .
>
> "*MCJV Claim*: shall mean the claim of MCJV filed by O&Y Florida . . . for the benefit of MCJV, . . . for *unpaid rent* due under the MCJV FF&E [furniture, fixtures, and equipment] leases." [Emphasis added]
>
> Article IV, *Means For Execution Of The Plan*:
>
> "The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form . . . annexed. . . . BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date [and] would pay the balance of the purchase price in cash . . . to the Trustee. The Trustee shall be required to: (i) . . . (ii) . . . (iii) take all steps and make all payment from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases. Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center. . . . At the closing BNY or its designee . . . would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date."

Article VI, *Treatment of Claim And Distributions*, subordinated the claims of MCJV based upon classification as an "insider" as follows:

> "Class 7 claims may be *impaired* . . . the allowed Class 7 claims will be paid from the MCJV property, if there is a deficiency the claim will be paid to the extent that funds are available *after* payment of the allowed Class 1, 2, 3, 4, 5, and 6 claims." [Emphasis added]

The plan's provisions for adequate assurance of *prompt* cure of the defaults in the unexpired leases and adequate

protection for MCJV's interest in the property were modified and limited pre-confirmation as follows:

> "2. We understand that notwithstanding anything in the plan or contract to the contrary, not more than *$2,000,000.00* will be paid . . . as provided in the plan until all claims through Class 6 are paid in full including their interest." [Emphasis added]

On *April 11, 1985*, Petitioner MCLP filed a Motion To Withdraw From Consideration The Plan of Reorganization Proposed By The Bank Of New York On Behalf Of The Debtors. MCLP objected to the plan's lack of feasibility, as it failed to provide adequate means to cure the defaults under the unexpired leases in default, *11 U.S.C. Section 1123(a) (5) (G)*,[4] and adequate protection for the indubitable equivalent of the lessor's interest in such property, *11 U.S.C. Section 361(3)*.[5]

On *June 24, 1985*, the Bankruptcy Court *denied* Respondent Bank of New York's Complaint To Determine The Validity, Priority, Or Extent Of The Lien Or Other Interest Of MCJV, filed on April 30, 1985, in *The Bank Of New York v. Olympia & York Florida Equity Corp., O&Y Equity Corp., Theodore B. Gould, and Miami Center Joint Venture*. This complaint alleged that the "Category 'A' and 'B' Leases" were unperfected security agreements, that UCC-1 forms had not been filed, and that debtor MCLP owned the leased property, App. 75.

The Bankruptcy Court's Memorandum Decision quieted MCJV's title to the leased furniture, fixtures, and equipment and found that the leases in question were "true leases".

On *July 3, 1985*, MCJV filed a revised Proof of Claim, amending the claim previously scheduled as allowed in the amount of the unpaid rent as of the date of petition by MCLP.

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[4] 11 U.S.C. Section 1123(a) (5) (G) is reprinted in the Appendix. App. 138.

[5] The applicable part of 11 U.S.C. Section 361(3) is reprinted in the Appendix. App. 138.

The revised Proof of Claim provided as follows:

> "[a]s of July 1, 1985, MCLP was obligated to pay to MCJV the sum of $6,672,679 for rental payments now in default and interest under said lease agreements, . . . [representing] the total due and payable at the date of filing and the amounts payable under the leases from that date to July 1, 1985, as administrative expenses and/or amounts necessary to cure under 11 U.S.C. Section 365, under assumption of the leases by the debtor and the proposed acquisition of title and ownership to the FF&E under The Bank of New York's plan or reorganization."

In the alternative, MCJV stated:

> "[I]f the 'A' and 'B' leases should be on any justifiable grounds *rejected*, rather than assumed and purchased, then the MCJV would be entitled to the full payment of defaulted rentals, plus interest to date and its full right to rejection damages, plus prompt removal and delivery to the MCJV of all furniture, fixtures, and equipment. . . ."

MCJV objected to the proposed taking of its property *without* consent, based upon exercise of the purchase option on behalf of The Bank of New York, as the Plan's proponent, by a trustee appointed *after* confirmation to convey title of the debtors' property to the Purchaser free of liens and leases, and stated:

> "[T]he additional amount payable to the owner/lessor MCJV under the two leases . . . constituting exercise of the option of purchase expressly provided in the leases, namely, the fair market value thereof . . . is *$7,745,000*."

Thereupon, on *July 31, 1985*, The Bank of New York filed a Second Amendment, offering to lend the Trustee no more than $14,417,679 for payment of MCJV's claim, secured by the issuance of a Trustee's Certificate, the loan being *conditioned* upon affirmance of the "true-lease" decision and reversal of MCJV's subordination.

On *August 8, 1985*, having previously deferred the scheduled confirmation hearing, the Bankruptcy Court entered a Confirmation Order, *without notice or hearing*, and approved

the proposed amended consolidated plan of reorganization filed by Respondent Bank of New York on behalf of the debtors, including numerous material amendments adopted *ex parte*. In this order, the following pertinent findings of fact and conclusions of law were stated:

> "The bank's plan subordinates the O&Y (sic) [MCJV] claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification." App. 94.
>
> "The bank has contended that the leases were not 'true leases' but instead were unperfected financing agreements. . . .I rejected the bank's contention. . . .The bank has appealed that decision and has filed a Second Amendment to Plan (C.P. No. 854) by which it in effect guarantees payment in full of the . . . claim of $14.4 million, if the bank is unable to obtain a reversal of my decision."
>
> "The bank's Second Amendment to its plan assures the funding necessary to pay the claim [MCJV's Claim No. 502] in the event my decision with respect to subordination is reversed." App. 94.

The objections of the debtors, MCJV, O&Y, and other parties in interest to the plan and order were summarily dismissed, without hearing or any examination or cross-examination of witnesses. The court stated that their objections were lacking in merit.

"Cram-down" [imposition by the court of provisions of a plan not accepted by the creditor] was granted without a hearing " . . . because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the Bank's plan." App. 96.

On *August 12, 1985*, the Bankruptcy Court appointed Mr. Fred Stanton Smith as "Trustee" of the Miami Center Liquidating Trust *without* satisfying the statutory requirements of 11 U.S.C. Section 1104(a), in accordance with the provisions of Article V of the Plan, *Creation of Trust*, vesting title and possession of the debtors' property in such trustee.

On *October 4, 1985*, the District Court, in an appeal of the Confirmation Order filed by MCJV, having stated that the

confirmed plan permitted " . . . the Liquidating Trustee to take title to furniture, fixtures, and equipment (FF&E) of MCJV and transfer it to appellee [The Bank of New York] and the subordination of MCJV's claim as an 'insider'," required the Bank to post a $15,000,000 corporate surety bond to provide adequate protection for MCJV from irreparable damage, the court finding that the conditions of the Second Amendment's Trustee's Certificate *failed* " . . . to preserve and protect appellants' interests."

On *June 23, 1986*, the District Court affirmed the Bankruptcy Court's Memorandum Decision of June 24, 1985, concluded that the "Category 'A' and 'B' Leases" were "true leases," and found, pertinent to the case *sub judice*, as follows with respect to the Bank's conduct:

> "At the [Joint Venture] closing in 1981, the Bank sought and obtained from MCJV a subordination of its owner's rights in the FF&E to the Bank's first mortgage lien. App. 101.
>
> It was agreed that *only* the FF&E under the Category A Lease would be subordinated, but only to then agreed and existent principal amount of the construction loan ($89 million). The Bank *accepted and acceded* to the full subordination of its entire first mortgage lien to the MCJV ownership position on the Category B Lease of FF&E. Appellant Bank clearly *recognized* the priority ownership/lessor status of the MCJV as to the FF&E under both leases. [Emphasis added] App. 101.
>
> The *Bank filed the UCC-1 forms* reflecting and recording priority rights of MCJV as owner. Such rights were superior to those of the Bank as well as to general and unsecured creditors." [Emphasis added] App. 101.

On *June 30, 1986*, the District Court, having previously affirmed the quieting of title to the Miami Center Joint Venture's chattels leased to the Miami Center Limited Partnership, remanded MCJV's appeal of the Confirmation Order, and found, pertinent to the appeal *sub judice*, as follows:

> "No confirmation hearing was held on the objections to the Bank's plan. Similarly, no hearing was

held on the issues of subordination or classification of appellant's claims and interest, and no opinion was rendered regarding the subordinate classification of O&Y/MCJV's lease claims in spite of this adjudication of their status as owners/lessors of the FF&E. Finally, no hearing was held regarding debtors' and O&Y/MCJV's objection that the Bank's plan was not fair and equitable." App. 112.

On *August 8, 1986*, MCJV invoiced The Bank of New York, as "Successor Lessee," in the amount of *$21,466,747.17*, which included unpaid rent and late charges from March 1, 1983, accelerated rent to the leases' expiration and the exercise of the purchase option at *$7,745,000*. MCJV stated that " . . . the Bank has failed and refused to discharge its cumulative and current obligations," and gave the Bank notice, pursuant to paragraph 24 of the leases, that " . . . in light of the Bank's having taken and retained possession and use of the FF&E under the two Leases, and the clear evidence of its purpose and intent of continuing to retain, use, and exercise dominion over the FF&E . . . we hereby exercise the purchase option, in accordance with paragraphs 18 of the two Leases, on your behalf. . . ."

On *March 24, 1987*, the District Court *reversed* the Confirmation Order, as amended *nunc pro tunc* on November 10, 1986, found that The Bank of New York's Plan was *unfair and inequitable*, concluded that the Miami Center Joint Venture's claim was improperly subordinated as an "insider", and accordingly held that the Amended Consolidated Plan of Reorganization did not satisfy *11 U.S.C. Section 1129(b)(1)*. App. 73.

Based on those conclusions, on *March 26, 1987*, MCJV filed a rent and replevin complaint against The Bank of New York and M.C. Holdings Partners [the Bank's nominee] in Dade County Circuit Court. This was thereafter removed by the Bank to the Bankruptcy Court and dismissed by the Bankruptcy Judge. App. 133. This decision was affirmed on the grounds of mootness, S.D. Fla. April 7, 1988. App. 136.

On *May 8, 1987*, the Bankruptcy Court allowed MCJV's claim on a reduced basis, relying on the following pertinent findings of fact and conclusions of law:

> "The claim presumes that these two executory contracts were assumed under the provisions of 11 U.S.C. Sections 365 or 1123(b)(2) and that the option to purchase contained in the leases has been exercised. App. 19.
>
> The Lessee . . . argues that the leases were rejected as a matter of law and that title to the property remains in the liquidating trustee standing in the lessor's shoes (sic). The liquidating trustee takes the same position (sic). App. 19.
>
> The deadline for the assumption of executory contracts in Chapter 11 cases is the confirmation of the plan. App. 20.
>
> They may be assumed in the plan. Section 1123(b)(2). The confirmation order constitutes approval of the assumption. That is what happened here. App. 20.
>
> The plan directed the liquidating trustee to sell the leased furniture, furnishings and equipment together with the hotel for a total price of $255.6 million with the trustee's warranty of title. The trustee did so. The sale was consummated and the personal property is in the possession of the purchaser where it has been since the October 10, 1985 closing. The assumption became effective on the effective date of the confirmed plan, October 10, 1985." App. 20.

The Bankruptcy Court's conclusion that MCJV's title passed to the Purchaser was based upon the stated assumptions that the purchase options were the property of MCLP's estate, and the debtor-lessee had the right of specific performance, assignable to the Trustee, requiring the lessor to convey title *without* consent, notwithstanding that (a) The leases were *in default* prior to the commencement of the proceedings; (b) No rent had been paid; (c) The purchase option was *not* an independent covenant of the leases; and (d) MCJV had *not* consented to the sale of its assets.

On *April 4, 1988*, The District Court affirmed the Bankruptcy Court's Order On Claim No. 502, based upon the following conclusions of law:

> " . . . the unexpired MCJV leases could be assumed in the plan if they had not been rejected prior to its Confirmation." App. 11.
>
> "Although *the appellants are correct in their statement of Florida law* . . . ['Florida law allows a party to refuse performance of a contract from an assignee'], they misconstrued its relevance in this instance. Title 11 U.S.C. Section 365(f) provides for the assignment of an unexpired lease notwithstanding a provision restricting assignment. Although *section 365(c)* excuses a party from accepting performance from an assignee if the party does not consent, that section *must be interpreted to apply only to personal service contracts* or contracts based upon personal trust or confidence. [Citations omitted] Since a lease of personal property like those at issue are not contracts for personal services or contracts that involve trust or confidence, that exception to assignment is inapplicable." App. 13.

In response to MCLP's motion for clarification requesting that the court clarify its order entered on April 4, 1988, that it (1) " . . . specify which party is liable for payment to the lessor of the (a) rent and late charges from March 1, 1983 to October 10, 1985, (b) the fair market value on the date of the exercise of the purchase option, and (c) the interest payable from October 10, 1985," and that it also (2) specify the findings of fact in the Bankruptcy Court's order that " . . . confirmation of the plan was adequate assurance that the trustee would cure . . . [noting] the consolidated estates of the debtors were adequate for the purpose of curing the default and . . . 'adequate assurance' of the trustee to do so," the District Court stated on April 29, 1988, pertinent to this appeal, as follows:

> "The bankruptcy court allowed the claim against the debtor in the amount of $14,557,754. This court affirmed that order and therefore allows the claim

> against the debtor Miami Center Limited Partnership in the amount of $14,557,754, an amount that does not take into account any interest that may have accrued in the meantime." App. 17.
>
> "This court, in resolving the question of adequate assurance, noted that courts no longer measure adequate 'by a strict yardstick' . . . [Citations omitted] In light of the court's flexible approach to finding adequate assurance of a cure, this court affirmed the bankruptcy court's determination that the confirmation of the plan and the consolidated estates of the debtors were adequate assurance that the trustee would cure the default." App. 17.

In a related proceeding concerning The Bank of New York's liability for payment of MCJV's claim and interest as carrying costs, in accordance with the Plan's Second Amendment, the Bankruptcy Court held on June 7, 1988, as follows:

> "The first source of payment will come from the cash which remains available to the Liquidating Trustee. However, it is probable that there will be no cash available from which the Liquidating Trustee may pay MCJV after distributions are made to various creditors, including administrative claimants.
>
> The second source of payment is from any property controlled by the Trustee, including Gould's interest in MCJV. With regards to this source of funding, this Court finds that the only control or interest Gould has remaining in the MCJV properties is his residual, possibly illusory, equity surplus rights after all of MCJV's debts have been satisfied. . . .It therefore appears that MCJV's claim will have to be paid through the Bank's surety bond."

The Bankruptcy Court reaffirmed its decision holding The Bank of New York liable for payment of MCJV's claim on September 9, 1988. The District Court affirmed on February 24, 1989, and The Bank of New York's appeal on this point is presently pending in the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE BANKRUPTCY COURT LACKED THE AUTHORITY TO REQUIRE A LESSOR NOT IN REORGANIZATION TO CONVEY TITLE TO LEASED PROPERTY TO A DEBTOR-LESSEE ALREADY IN DEFAULT OR ITS SUCCESSOR IN INTEREST UNDER THE BANKRUPTCY CODE, APPLICABLE NONBANKRUPTCY LAWS, THE COMMON LAW OF THE STATE OF FLORIDA, AND THE FIFTH AMENDMENT TAKING CLAUSE OF THE UNITED STATES CONSTITUTION.

11 U.S.C. Section 1129(a)(1) provides that a court shall confirm a plan *only if* "the plan complies with the applicable provisions of this title." Section 363(f)[6] limits the authority of a trustee or a debtor-in-possession to sell property free and clear of any interests of a nondebtor in such property. In the case *sub judice*, the Bankruptcy Court's Memorandum Decision, App. 75, which resolved any *bona fide* dispute concerning ownership of the property and quieted MCJV's title to the leased furniture, fixtures, and equipment, *11 U.S.C. Section 363(f)(4)*, determines the Trustee's lack of authority to obtain title to and sell the Miami Center Joint Venture's property without its consent.

The Bankruptcy Court's Memorandum Decision was affirmed by the District Court, App. 98, in a Memorandum Opinion which is based upon the following pertinent findings of fact:

> " . . . indicia of the intent to treat the leases as true leases included: (1) approval by the Bank of the form and substance of leases in writing at the Joint Venture Closing; (2) *the absence of any provision in the leases granting the lessee an equity or property interest;* (3) the express provision in the leases that *title remained in the lessor;* . . . (7) if the option to purchase is not exercised MCLP had an obligation to return the leased items; (8) the leases provided

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[6] 11 U.S.C. Section 363(f) is reprinted in the Appendix. App. 139.

> that *no title or right passed to the lessee and title and ownership of the equipment remained in the lessor.*" App. 99.

The District Court's Memorandum Opinion, affirming the Bankruptcy Court's Memorandum Decision, quieting MCJV's title and precluding any *bona fide* dispute concerning ownership of the leased furniture, fixtures, and equipment, was affirmed by the Eleventh Circuit. MCJV did *not* consent to sell its property in accordance with the Plan's provisions, *11 U.S.C. Section 363(f)(2).*

The principles of common law, applicable nonbankruptcy laws, and the statutory requirements of *11 U.S.C. Section 365* are all inconsistent with the Bankruptcy Court's conclusion of law in the case with respect to the assumption of unexpired leases in default and the authority of a debtor-lessee to exercise a purchase option as a dependent covenant in a personal property lease *without* consent, where the court alleged:

> The deadline for assumption of executory contracts in chapter 11 cases is the confirmation of the plan. Section 365(d)(2). They may be assumed in the plan, Section 1123(b)(2). The confirmation order constitutes approval of the assumption."

The literal meaning of Section 365(d)(2) precludes the Bankruptcy Court's conclusion of law. *11 U.S.C. Section 365(d)(2)* provides, in relevant part:

> "In a case in chapter 9, 11, or 13 of this title, the trustee may assume or reject an . . . unexpired lease . . . of personal property of the debtor at any time *before* the confirmation of a plan . . . " [Emphasis added]

Furthermore, the Bankruptcy Court's conclusion that unexpired leases in default may be assumed in the plan in accordance with Section 1123(b)(2) *omits* the material statutory reference, which states, "Subject to Section 365 of this title" a plan may provide for the assumption, rejection, or assignment of any unexpired lease of the debtor not previously rejected. It also overlooks the express provision of Article XI of the Plan that any executory contracts and unexpired leases not assumed sixty days before the date of the Confirmation Order

or specifically listed in Exhibit D to the Plan [which these were not] "shall be deemed rejected as of the date of the Confirmation Order."

The plain meaning of the statutory requirements for the assumption of an unexpired lease in default in accordance with 11 U.S.C. Section 365 also must be strictly construed. Section 356(a) provides that, subject to subsections (b), (c), and (d),

> " . . . the trustee, subject to the court's approval, may assume or reject any . . . unexpired lease of the debtor."

Court approval requires notice and a hearing to satisfy constitutional requirements of due process of law and to provide the evidence required for the trial court's findings of facts to satisfy the statutory requirement of adequate protection and assurance of the curing of defaults and future performance specified in subsection (b) of that section.

Since the amended confirmed plan limited to *$2,000,000* the funds available for the payment of creditors subordinate to Class 6, App. 112, Section 365(b)(1)'s statutory requirements for the assumption of an unexpired lease in default *before* confirmation of a plan were *not* satisfied. The defaults were not cured, *contra, 11 U.S.C. Section 1123(a)(5)(G)*, and adequate assurance of the *prompt* cure of such defaults was not provided, *contra, 11 U.S.C. Section 365(b)(1)(A)*. MCJV was not compensated or provided with adequate assurance for pecuniary losses related to the failure to cure the defaults, *contra, 11 U.S.C. Section 365(b)(1)(B)*. Adequate assurance of future performance was not provided, *contra, 11 U.S.C. Section 365(b)(1)(C)*.

The legislative history of *11 U.S.C. Section 363(f)* indicates that when an entity, other than the estate, is compelled to accept money satisfaction for its interest in property based upon exercise of a binding purchase option, the "adequate protection" requirement of the Bankruptcy Code in connection with a sale free and clear of such interests, most often, attaches to the sale proceeds, House Report No. 95-595, 95th Cong., 1st Sess. 345 (1977). Furthermore, *11 U.S.C. Section 506(c)* provides that "[t]he Trustee [or debtor in possession] may

recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of . . . disposing of such property to the extent of any benefit to the holder of such claim."

More than four years have elapsed since the Bankruptcy Court's Memorandum Decision was entered quieting MCJV's title to the leased furniture, fixtures, and equipment, and the trustee's conveyance of title of the land, leasehold improvements, and certain chattels owned by the Miami Center Limited Partnership to the City National Bank of Miami, the Bank of New York's designee as Purchaser. MCJV's wrongfully subordinated claim still remains unpaid.

The District Court, in affirming the Bankruptcy Court's conclusion [which had ignored the requirements of 11 U.S.C. 365(d)(2) and paragraph B of Art. XI of the Plan that assumption had to be *prior* to confirmation] that the unexpired MCJV leases could be assumed in the plan if they had not been rejected *prior* to confirmation, stated:

> "A trustee may assume or reject within a reasonable time and what constitutes a reasonable time for assumption or rejection is left to the bankruptcy court's discretion in light of all of the circumstances. See *Theatre Holding Corporation v. Mauro*, 681 F.2d 102 (2nd Cir. 1982)." App. 12.

The Second Circuit's *Theatre Holding* opinion, however, held that the Bankruptcy Court's discretion must be construed in the context of applicable laws and the benefits of the lease to the debtor's estate. The damage to MCLP's estate arising from the assumption of the unexpired leases in default and the exercise of the purchase options solely for the benefit of the Bank of New York's designee as Purchaser is *$4,986,900* plus carrying costs such as interest of *$7,191,297* as of October 31, 1989, accruing at a daily rate of *$5,863.54*.

The District Court's conclusion of law that 11 U.S.C. Section 365(c), excusing a lessor from accepting performance from an assignee without consent, is applicable only to personal service contracts or contracts based upon personal trust, and does not apply to unexpired leases of personal property, App. 13, is inconsistent with precedent of various courts of appeal. The Fifth Circuit Court

of Appeals, in *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983), concluded that:

> "Nothing in the statutes authorized the district court to depart from the express language of Section 365(c), which provides for its application to unexpired leases and belies any limitation to personal service contracts."

Also, the First Circuit Court of Appeals has held, in *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27 (1st Cir. 1984), that:

> "The language of the section [11 U.S.C. Section 365(c)(1)(A)] does not limit its effects to personal service contracts. It refers generally to contracts that are not assignable under nonbankruptcy law . . . The legal history of Section 365(c) says nothing about 'personal services.' To the contrary, it speaks of letters of credit, personal loans, and leases . . . "

It is clear that the District Court's Order, as amended, requiring the Bank of New York to post a corporate surety bond for the payment of MCJV's claim, the Plan's Second Amendment having failed to adequately protect MCJV's ownership rights, did not satisfy the statutory requirements of adequate assurance or adequate protection in accordance with the Bankruptcy Code.

Also, according to the well established doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) a federal court must adhere to state common law when deciding substantive issues and a Bankruptcy Court is no exception. The District Court's affirmation of the Bankruptcy Court's decision that ". . . .the unexpired MCJV leases could be assumed in the plan if they had not been rejected prior to confirmation" ignored the *Erie* doctrine. In the State of Florida, if a purchase option, as in this case, is a dependent covenant in an unexpired lease in default, the lessee's right to exercise such purchase option and demand specific performance of the lessor is lost if the lessee is in default of payment. *Vandervalk v. Brewer*, 436 So.2d 1083 (Fla. 3rd DCA 1983). The Bankruptcy Court should have ruled on the purchase option according to this Florida common law principle.

Granting authority to a bankruptcy court to require the Miami Center Joint Venture, as a nondebtor-lessor, to convey title to its property to the City National Bank of Miami, the Bank of New York's designee as Purchaser of the debtor's

property, in accordance with the provisions of a plan of reorganization filed on behalf of MCLP as the debtor-lessee, is also inconsistent with *Calloway v. Benton*, 336 U.S. 132 (1949), in which this Court held, in relevant part:

> "The statute does not, however, give the Commission or court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property, and no such power has been asserted by the Commission in this case. The plan of reorganization in effect hands South Western (the lessor) a contract of sale. Whether or not South Western signs the contract must depend no only upon its business judgment, but upon the charter of the company and the laws of the state of its incorporation." 336 U.S. at 141.

The construction and terms of the subject unexpired leases in default did not grant the debtor-lessee MCLP a property interest in the leased furniture, fixtures, and equipment, App. 99, and precluded assignment by the lessee without the lessor's prior written consent. App. 100. Only the lessor had the authority to exercise the purchase option in the event of default, App. 100.

Accordingly, the Bankruptcy Court's appointment of an individual " . . . designated as trustee of all property of the estates of the debtors within the meaning of Section 541(a) of the Code," Art. V., *Creation of Trust*, cannot be construed as granting Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust and the debtor MCLP's successor in interest, a property interest in the furniture, fixtures, and equipment covered by these leases, or the authority as an assignee to exercise the purchase option in accordance with the confirmed Plan's provisions. The plan of reorganization must be construed as no more than an offer to purchase MCJV's property, granting the nondebtor-lessor "an unfettered right to accept or reject." 336 U.S. at 132.

Even more fundamental than the disregard of express statutory provisions by the courts is the apparent disregard by the Congress of the constitutional ban against the taking of private property for non-public purposes, whether with or without compensation. Since applicable nonbankruptcy law

would not permit the Trustee's sale of MCJV's property to the Bank of New York's designee free and clear of the Miami Center Joint Venture's interest in such property, *11 U.S.C. Section 363(f)(1)*, the question must be addressed as to whether 11 U.S.C. § 363 (f), and the Bankruptcy Court's application of it in this case violates the Fifth Amendment Takings Clause of the United States Constitution. The Bankruptcy Court compelled a non-debtor lessor to accept a money satisfaction for its interest in property not part of a debtor-lessor's estate in accordance with 11 U.S.C. § 363(f) (5). If the Court had provided for payment to the lessor from the sales proceeds as "adequate protection" under the statute, the fact still remains, that the Bankruptcy Court lacked the authority to require the non-debtor lessor to turn over ownership of its property to the debtor-lessee's estate, when the lessor was not a party to the proceeding, and its property was not under jurisdiction of the Court.

If the constitutional rule of law, adopted in *Thompson v. Consolidated Gas Co.*, 300 U.S. 55 (1937) that " . . . one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid," is applicable to the administration of the bankruptcy laws, then it must be concluded that Section 363(f) is a broad grant of authority to courts in bankruptcy proceedings which is contrary to the Fifth Amendment.

In its decision to require MCJV to turn over ownership of its leased property to the debtor estate of MCLP, the Bankruptcy Court ignored the existing law on every level. The Court did not adhere to the Bankruptcy Code in requiring said transfer or follow the bankruptcy rule of law applicable to this situation as set forth in the *Calloway* case. Also, the court did not interpret the purchase options within the leases according to Florida common law principles as it is required to do by the well-established *Erie* doctrine. Finally, the transfer that the Court required violated the Fifth Amendment Takings Clause as it resulted in the non-debtor lessor being compelled to transfer ownership in property to the debtor-lessee's estate, when the lessor's property was not subject to the Bankruptcy Court's jurisdiction.

II. THE ELEVENTH CIRCUIT'S RELIANCE UPON ITS PRIOR "MOOTNESS" RULING, 838 F.2D 1547 (11TH Cir. 1988), DISMISSING THE DEBTORS' APPEAL OF THE CONFIRMATION ORDER, FOR THE PURPOSE OF GRANTING AUTHORITY TO THE BANKRUPTCY COURT TO REQUIRE THE CONVEYANCE OF TITLE OF THE PROPERTY OF A NONDEBTOR, IS INCONSISTENT WITH THE DUE PROCESS REQUIREMENT OF THE FIFTH AMENDMENT OF THE CONSTITUTION THAT ONE IS NOT BOUND BY THE JUDGMENT OF THE COURT ADVERSELY AFFECTING HIS INTERESTS IN LITIGATION IN WHICH HE IS NOT A PARTY, AND THE MOOTNESS DOCTRINE.

The various arguments of the Appellants supporting their contention that the Bankruptcy Court erred in concluding that MCJV's title to the furniture, fixtures, and equipment leased to the Miami Center Limited Partnership passed to the Trustee on October 10, 1985, were dismissed by the Eleventh Circuit on grounds of "mootness".

The Appellants also argued that the Court's resulting calculation of the amount of MCJV's claim and imposition of liability for the same were likewise incorrect, based upon the Court's conclusion of law, held in dismissing the debtors' appeal on the grounds that "The Plan has been substantially consummated . . . and that it has become legally and practically impossible to unwind the consummation of the Plan or otherwise to restore the status quo before confirmation," App. 8. Although the plan provided for an abatement of the purchase price if the Trustee could not obtain the FF&E's title, App. 6, this ruling was made the basis for dismissal of this appeal.

The panel's conclusion is inconsistent with the record of the proceedings, a denial of due process under the Fifth Amendment of the Constitution, and a misconstruction of the "mootness" doctrine. In the piecemeal appellate process characterizing these bankruptcy proceedings, the Miami Center Joint Venture was *not* a party to the debtors' appeal of the order substantively consolidating the debtor's estates, in

accordance with the Plan's provisions, and the Bankruptcy Court's Confirmation Order.

The District Court concluded that the debtors, as Appellants, lacked standing to assert the objections of the Miami Center Joint Venture "as a method of attacking the validity of the overall reorganization plan," citing *R. T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983), and held that the objections of the Miami Center Joint Venture to the Confirmation Order were properly presented in an appeal before another Judge in the same District Court, finding, in relevant part to this issue, as follows:

> "It is possible that as a result of Judge Atkins' ruling, the classification of this claim which Judge Atkins may grant, could possibly affect the Plan overall . . . " 59 B.R. 340 (S.D. Fla. 1986).

Thereafter, in the Miami Center Joint Venture's appeal of the Confirmation Order, the District Court, through Judge Atkins, having concluded that the Plan's classification structure did *not* satisfy the requirements of Code Sections 1122, 1123, and 1129, *reversed* the order of confirmation.

Thus, the issue of the Bankruptcy Court's authority to require MCJV to convey title pursuant to the Plan's provisions was adjudicated by a different District Judge in a *separate* appellate process dealing with the Confirmation Order. The principle that the confirmation of a Chapter 11 plan binds all creditors of the debtors to the terms of the plan, 11 U.S.C. Section 1141(a), cannot be construed as applicable to the interests of the Miami Center Joint Venture in the leased furniture, fixtures, and equipment and cannot adversely affect the treatment and payment of its claim.

The holding that a confirmed plan of reorganization is binding upon every party that holds a claim or interest, even though that holder of a claim or interest is not scheduled, has not filed a claim, does not receive a distribution under the plan, or is not entitled to retain an interest under such plan, is

inconsistent with the fundamental principle of Anglo-American jurisprudence restated by this Court that:

> "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree; *John W. Martin, et al., v. Robert K. Wilkes, Personnel Board of Jefferson County, Alabama, et al.* ___ S. Ct. ___, June 12, 1989;
>
> . . .
>
> failure to join an indispensable party may render a judgment against a defendant violative of due process, *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*, 368 U.S. 71 (1961);
>
> . . .
>
> a judgment that substantially affects rights of a nonjoined indispensable party, or an indispensable party over whom the court does not have jurisdiction, violates due process of law, *Hanson v. Denckla*, 357 U.S 235 (1958)."

As a rule of administrative practice in a bankruptcy proceeding, the "mootness" doctrine cannot be construed to deny substantive property rights of nondebtors. The Eleventh Circuit's "mootness" ruling dismissing the debtors' appeal of the Confirmation Order held that "The mootness standard is preserved in the present Bankruptcy Code at 11 U.S.C. Section 363(m),[7] but this provision applies *only* to the sale of the debtors' property by the trustee pursuant to Section 363(b) or (c)." The court concluded the case law indicated that, in the administration of the bankruptcy laws, the purpose of the "mootness" rule was as follows:

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[7] 11 U.S.C. Section 363(m) is reprinted in the Appendix. App. 139.

> "The rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sales process upon which good faith purchasers relied." App. 43.

The Eleventh Circuit also made the finding that:

> "The Bank bargained for and purchased the FF&E as part of the sale. Because litigation was in progress over whether title to the FF&E was in lessors of the bankrupt, the Bank put up $14 million to pay the lessors if they prevailed. But, since the Bank would then have paid twice for the same assets, it was given a Trustee's Certificate enforceable against assets of the estate to protect if from the double payment. Without the Trustee's Certificate, if double payment ensues the Bank will become an unsecured creditor to the extent of some $14 million." App. 49.

A "bargain" to purchase property of a non-debtor requires the seller's consent, since *28 U.S.C. Section 1334 (d)* limits the subject matter jurisdiction of a court in a bankruptcy case to "all of the property . . . of the debtor as of the commencement of such case." Thus, the Eleventh Circuit's "mootness" ruling, dismissing the debtors' appeal of the bankruptcy court's Confirmation Order, must be construed as limited to providing finality only to the discrete and consummated sale of the *debtor's* property, and cannot adversely affect MCJV's interests or impose liability upon MCLP's estate for the property's purchase and related carrying costs for nonpayment of MCJV's claim, resulting from implementing the Plan's provisions wrongfully subordinating such claim.

Although the confirmed Plan has been substantially consummated in accordance with 11 U.S.C. Section 1101(2), it has not been fully implemented, and the case has not been closed. Thus, the Eleventh Circuit's "mootness" ruling, as applied to the Miami Center Joint Venture's property interest in the leased furniture, fixtures, and equipment, and determination of the proper amount of the claim payable by the debtor MCLP's estate cannot be construed as moot, since, prior to the closing of the case, "a claim that has been allowed may be reconsidered for cause," in accordance with 11 U.S.C. Section 502(j).

The calculation of the amount of MCJV's claim, App. 25, is erroneous as matter of law. 11 U.S.C. Section 502, *Allowance of Claims and Interests*, (b) provides:

> "If [an] objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . as of the *date of the filing of the petition* and shall allow such claim in such amount."

The date of commencement of the payment of rent was *March 1, 1983*. The total monthly rent payable was *$195,281.25*. Thus, MCJV's claim was *$3,882,063*, including prepetition interest of $423,695 as a late charge as of the date upon which MCLP filed its petition. Postpetition interest in the amount of *$575,866* was payable on such claim as of October 10, 1985.

The subject unexpired leases in default were rejected as a matter of law, in accordance with the statutory requirements of 11 U.S.C. Section 365 (b) (1), (d) (2), and the confirmed Plan's Article XI, *Executory Contracts*, requiring that all unexpired leases of the Debtors not expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. Section 365 " . . . shall be deemed rejected as of the date of the Confirmation Order." Otherwise, in accordance with Section 503 of the Bankruptcy Code, MCJV's request for payment of an administrative expense as an actual and necessary cost of preserving MCLP's estate for services rendered after the commencement of the case, including interest as a late charge, represents *$2,880,250* as of October 10, 1985.

If the subject unexpired leases in default had been assumed in accordance with the statutory requirements of Section 365, the Trustee's assignment and transfer of physical possession of the leased personal property to the Purchaser relieved the estate from any further liability in accordance with subsection (k) for (i) the payment of monthly rent of *$195,282.25*, (ii) the fair market value of the equipment in the amount of *$4,986,900*, (iii) interest as late charges and carrying costs in the amount of *$7,191,297* as of October 31, 1989, accruing thereafter at a daily rate of *$5,863.54*.

As a matter of law, the amount payable as a claim and payment for administrative expenses related to preserving the debtor MCLP's estate is *$7,338,152*, while the remainder of the adjudicated liability is the direct and sole liability of the Bank of New York, as the holder of a secured claim, to the extent that MCLP, as the debtor in possession, or the Trustee had the authority to exercise the purchase options and expend money as expenses for disposing of the secured creditor's collateral, free and clear of liens and leases, in accordance with *11 U.S.C. Section 506(c)*, *See* U.S. Code Cong. & Adm. News, 1978, p. 6451.

Thus, the Eleventh Circuit's application of the "mootness" doctrine to grant authority to a court in a bankruptcy case to require the passage of title of the property of MCJV as a lessor not in reorganization, to deny relief to the Petitioner with respect to the Court's calculation of the amount of the claim, and to impose liability upon MCLP's estate for the fair market value of the property and carrying costs as interest damages the consolidated debtors' estates as well as third party creditors, and obstructs the emergence of the debtors as revitalized entities.

The determination of the proper amount of the claim payable on behalf of the debtor MCLP's estate, the Bank of New York's liability as the holder of a secured claim benefiting from the Plan's treatment of MCJV's claim, and the authority of a bankruptcy court to require MCJV to convey title in accordance with the provisions of a confirmed plan of reorganization, represent *real and substantial controversies*, admitting of specific relief through a decree of conclusive character. *Aetna Life Insurance Co. V. Haworth*, 300 U.S. 227, 240-241 (1937).

The issue of the Bankruptcy Court's authority to require MCJV as a lessor not in reorganization to convey its property in accordance with the provisions of a plan and the question of whether either MCLP as a debtor-lessee in default or the Trustee as MCLP's successor in interest had the right to exercise purchase options does not represent a request that a court issue an advisory opinion and decide questions that cannot affect the rights of litigants in the case. *Oil Workers Union v. Missouri*, 361 U.S. 363, 367 (1960).

By dismissing the case below, the Eleventh Circuit misapplied the "mootness" doctrine. This misapplication resulted in the denial of the Miami Center Joint Venture's Fifth Amendment right to due process of law, and imposition of liability upon MCLP's estate for exercise of the purchase options and the carrying costs for The Bank of New York's wrongful subordination of payment of MCJV's claim.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ and reverse the decision of the Court below.

Respectfully submitted,

ROBERT M. MUSSELMAN
413 7th Street, N.E.
Charlottesville, VA 22901
Telephone (804) 977-4500
Attorney for Miami Center Limited Partnership

TABLE OF CONTENTS

Page

APPENDICES

A. Order of Eleventh Circuit Court of Appeals (On Petition for Rehearing, filed by Olympia & York Florida Equity Corp. on behalf of Miami Center Joint Venture), entered on July 31, 1989..... App. 1

B. Order of Eleventh Circuit Court of Appeals (On Petition for Rehearing, filed by Miami Center Limited Partnership), entered on July 31, 1989..... App. 3

C. Opinion of Eleventh Circuit Court of Appeals, entered on June 6, 1989 [Reported at 874 F.2d 780 (11th Cir., 1989)]..... App. 5

D. "Order Affirming Bankruptcy Court's Order On Claim No. 502," U.S. District Court (S.D. Fla.), entered on April 4, 1988..... App. 9

E. "Order On Appellant's Motion For Clarification," U.S. District Court (S.D. Fla.), entered on April 29, 1988..... App. 16

F. "Order On Claim No. 502 (MCJV Leases A and B to MCLP)," U.S. Bankruptcy Court (S.D. Fla.), entered on May 8, 1987 [Reported at 75 B.R. 793 (Bkrtcy. S.D. Fla., 1987)]..... App. 19

G. Order of Eleventh Circuit Court of Appeals (On Petitions for Rehearing and Petition for Rehearing En Banc), entered on March 10, 1988 [Reported at 838 F.2d 1547 (11th Cir., 1988)], cert. denied ___ U.S. ___, 69 S.Ct. 109 (1988)..... App. 30

H. Memorandum Opinion *Reversing* Order of Confirmation, U.S. District Court (S.D. Fla.), entered on March 24, 1987..... App. 55

TABLE OF CONTENTS – Continued

Page

I. Memorandum Decision Quieting MCJV's Title, U.S. Bankruptcy Court (S.D. Fla.), entered on June 24, 1985.....App. 75

J. "Liquidating Trustee's Post-Hearing Summary Re MCJV Claim," (Bkrtcy. S.D. Fla.), filed on April 23, 1987 (C.P. 1601).....App. 83

K. "Order Appointing Trustee," U.S. Bankruptcy Court (S.D. Fla.), entered on August 12, 1985.....App. 89

L. "Confirmation Order," U.S. Bankruptcy Court (S.D. Fla.), entered on August 8, 1985....App. 92

M. Memorandum Opinion of U.S. District Court (S.D. Fla.), entered on June 23, 1986.....App. 98

N. Memorandum Opinion of U.S. District Court (S.D. Fla.), entered on June 30, 1986....App. 109

O. Replevin Complaint, Circuit Court of Eleventh Judicial Circuit for Dade County, Florida, filed on March 26, 1987.....App. 119

P. "Order Confirming Removal of Civil Action to the Bankruptcy Court And Dismissing Complaint Therein Without Prejudice," U.S. Bankruptcy Court (S.D. Fla.), entered on May 6, 1987..App. 133

Q. "Order Dismissing Appeal As Moot," U.S. District Court (S.D. Fla.), entered on April 7, 1988.....App. 136

R. Relevant Constitutional and Statutory Provisions.....App. 138

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5429

IN RE: HOLYWELL CORPORATION,	Debtor.
OLYMPIA & YORK FLORIDA EQUITY CORPORATION and MIAMI CENTER JOINT VENTURE,	Plaintiffs-Appellants,
versus	
HOLYWELL CORPORATION, et al.,	Defendants-Appellees.

IN RE: HOLYWELL CORPORATION,	Debtor.
HOLYWELL CORPORATION, et al.,	Plaintiffs-Appellants,
versus	
MIAMI CENTER JOINT VENTURE, et al.,	Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(July 31, 1989)

BEFORE: VANCE and COX, Circuit Judges, and DYER Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants Olympia & York Equity Corporation and Miami Center Joint Venture, is Denied.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5429

IN RE: HOLYWELL CORPORATION, — Debtor.

OLYMPIA & YORK FLORIDA EQUITY CORPORATION and MIAMI CENTER JOINT VENTURE, — Plaintiff-Appellants,

versus

HOLYWELL CORPORATION, et al., — Defendants-Appellees.

IN RE: HOLYWELL CORPORATION, — Debtor.

HOLYWELL CORPORATION, et al., — Plaintiffs-Appellants,

versus

MIAMI CENTER JOINT VENTURE, et al., — Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(July 31, 1989)

BEFORE: VANCE and COX, Circuit Judges, and DYER Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants Miami Center Limited Partnership, Holywell corporation and Theodore Gould, is Denied.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX C

In re HOLYWELL CORPORATION, Debtor.

OLYMPIA & YORK FLORIDA EQUITY CORPORATION and Miami Center Joint Venture, Plaintiffs-Appellants,

v.

HOLYWELL CORPORATION, et al., Defendants-Appellees.

In re HOLYWELL CORPORATION, Debtor.

HOLYWELL CORPORATION, et al., Plaintiffs-Appellants,

v.

MIAMI CENTER JOINT VENTURE, et al., Defendants-Appellees.

No. 88-5429.

United States Court of Appeals, Eleventh Circuit.

June 6, 1989.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE and COX. Circuit Judges, and DYER, Senior Circuit Judge.

VANCE, Circuit Judge:

The appellants challenge the bankruptcy court's decision allowing a claim for $14,557,754 against the bankrupt estate and in favor or the Miami Center Joint Venture

("MCJV"). The facts in the underlying bankruptcy case and relationships among the parties are complex and have been stated in numerous published decisions. *See e.g., Holywell Corp. v. Bank of New York,* 59 B.R. 340 (S.D.Fla.1986), *vacated with instructions to dismiss, Miami Center Ltd. Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir. 1988) (instructing district court to dismiss as moot appeal of bankruptcy court's confirmation order). We therefore summarize only those facts pertinent to our resolution of this appeal.

The Miami Center Limited Partnership ("MCLP") was the developer of the Miami Center Project, a luxury office, hotel, and parking development in downtown Miami. In May 1981 MCLP leased $7.775 million worth of furniture, fixtures, and equipment ("FF & E") from MCJV under two virtually identical lease agreements. Both leases contained the following option to purchase clause:

> Lessee shall have the option to purchase at any time all, but not less than all, the [FF & E] at a price equal to the fair market value thereof. . . .

On August 22, 1984, MCLP was among five debtors involved in the Miami Center Project that filed for reorganization under chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1174. The Bank of New York, the construction lender to the project proposed a plan of reorganization that was accepted by all creditors but was opposed by the five debtors. Under the terms of the plan, a purchaser designated by the Bank was to buy the Miami Center Project for $255.6 million. This price included the purchase of the FF & E. The plan required the liquidating trustee to take any action necessary, including the exercise of the purchase options in the FF & E leases, to obtain

title to the FF & E so that the trustee could convey title to the FF & E to the purchaser at closing. The plan also provided that the total price to be paid by the purchaser would be reduced by the value of the FF & E if for some reason the liquidating trustee could not obtain title to the FF & E.

The bankruptcy court confirmed the plan and on October 10, 1985, all of the debtors' property was transferred to the liquidating trustee. The trustee then delivered title to the FF & E to the purchaser.

MCJV filed the claim at issue against the trustee, as successor in interest to MCLP, for the unpaid rent and purchase option price of the May 1981 leases. The court allowed the claim, ruling that (1) MCLP exercised the purchase option at or before October 10, 1985, (2) title to the FF & E passed to the liquidating trustee on October 10, 1985, (3) the trustee then sold the FF & E to the purchaser as part of the $255.6 million sale of the Miami Center Project. *In re Holywell*, 75 B.R. 793 (Bankr.S.D.Fla. 1987). The court calculated the amount due MCJV to be $14,557,754. This figure consisted of $6,112,318 in unpaid rent from May 1981 until October 10, 1985, $2,478,818 in interest on the past due rent, $4,986,900 for the purchase option price, and $979,718 in interest on the purchase option price. *Id.* at 796.

The district court affirmed in an unpublished decision and several debtors and creditors now appeal to this court. The appellants are MCLP, MCJV, the Olympia & York Florida Equity Corporation ("O & Y"), Holywell Corporation ("Holywell"), and Theodore B. Gould. O & Y is a major creditor of MCLP. Holywell and Gould are two

of the five bankrupt debtors. The appellee is the Bank of New York.

The appellants offer various arguments to support their contention that the bankruptcy court erred in concluding that title to the FF & E passed to the liquidating trustee on October 10, 1985, and that the court's resulting calculations and imposition of liability therefore were incorrect. Passage of title of the FF & E to the liquidating trustee, however, was part of the confirmed plan of reorganization. We have already held that "the plan ha[s] been substantially consummated . . . and that it ha[s] become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). The issue argued by appellants is therefore moot. *Id.*

Appellants MCLP, Holywell, and Gould also attempt to raise a fraud claim against the Bank of New York. These three appellants, however, did not raise a fraud claim in the bankruptcy court or in the district court. This court will not consider an issue raised for the first time on appeal unless the interest of substantial justice is at stake. *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir.1976). Appellant's fraud claim does not present such an interest.

The judgment of the district court is AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-1317-CIV-Atkins

MIAMI CENTER JOINT VENTURE, et al.,
Appellants.

v.

THE BANK OF NEW YORK,
Appellee.

Case No. 87-1583-CIV-Atkins

MIAMI CENTER LIMITED PARTNERSHIP, et al.,
Appellants,

v.

THE BANK OF NEW YORK.

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER ON CLAIM NO. 502

THIS APPEAL challenges the Bankruptcy Court's order on Claim No. 502 allowing the claim in the amount of $14,557,754.00 Preliminary to calculating the amount of the claim, the court found that the claim presumed that the two executory contracts were assumed under the provisions of 11 U.S.C. §§ 365 or 1123(b) (2) and that the option to purchase contained in the leases had been exercised. This court agrees with the Bankruptcy Court's analysis and conclusion and affirms the order.

The facts of this case have been reiterated in numerous decisions and orders resolving the various and complex issues, *see, e.g., Holywell Corp. v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and will not be repeated here. At issue in this appeal is whether the Bankruptcy Court erred in its conclusion that the MCJV leases were assumed and in its calculation of damages.

The appellants believe that the statutory requirements which specify the time within which an executory lease may be assumed or rejected with court approval were not met nor was the default timely cured. The appellants contend that this mandates finding that the leases were rejected by operation of law. In addition, the appellants cite 11 U.S.C. § 365(c) (1) (A) and (B) which excuses a party from accepting performance from an assignee of an executory contract if "applicable law excuses a party" and that party does not consent. Florida law allows a party to withhold consent to a financially unsound party. Since Miami Center Joint Venture ("MCJV") did not consent to the liquidating trustee's assumption of the leases or assignment to the Bank's successor, the purported assumption is void. Finally, appellants assert that the purchase option was never exercised by the liquidating trustee. Since the Bank took possession it is liable for the resulting rent and late charges. Appellants list three components to their claim:

1. Rent and late charges from 3/1/83-10/10/85 owed by the liquidating trustee

$7,338,152.00

2. Rent and late charges from 10/10/85-3/1/87 and accelerated rent from 3/1/87-2/28/88 owed by the Bank

$6,812,080.00

3. The cost of the FF & E as appraised

$7,745,000.00

The appellee, The Bank of New York ("Bank") cites the confirmed plan which provided for assumption of the leases and points to the bond that this court required as "adequate assurance" that it would perform under the plan's Funding Agreement to provide cash for payment of Claim No. 502 if and when the claim was fixed and the other conditions of the Funding Agreement were met.

STANDARD OF REVIEW

A district court must accord substantial deference to the findings of fact made by the Bankruptcy Court. The district court may reverse those findings only when they are "clearly erroneous," *see Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983), however, conclusions of law are subject to plenary review. *See Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980).

ASSUMPTION

Under Title 11 U.S.C. § 365(a), a trustee subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. Section 1123, which specifies the contents of a proposed plan, allows a plan to assume or reject any executory contract or unexpired lease not previously rejected. *See* 11 U.S.C. § 1123(b)(2). Therefore the unexpired MCJV leases could be

assumed in the plan if they had not been rejected prior to its confirmation.

On April 28, 1985, Miami Center Limited Partnership ("MCLP") filed a timely motion to assume or reject executory contracts including the A and B leases. The Bank, MCLP, and Olympia & York ("O&Y") jointly moved to postpone the hearing on the motion. The Bankruptcy Court thereafter granted the Motion to Assume or Reject on May 23, 1985. A trustee may assume or reject within a reasonable time and what constitutes a reasonable time for assumption or rejection is left to the Bankruptcy Court's discretion in light of all of the circumstances. *See Theatre Holding Corp. v. Mauro*, 681 F.2d 102 (2d Cir. 1982).

The Bank's reorganization plan, accepted by the creditors over the debtor's competing plans, was confirmed in August of 1985. On October 10, 1985, pursuant to the plan, the Miami Center was sold to the Bank's designee for $255.6 million dollars. The plan also required the Trustee to "take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases." The plan provided further that the Bank would receive "fee title to the FF&E covered by the MCJV Center Closing Date." The plan expressly provides for the assumption of the leases and the exercise of the purchase option in accord with the requirements of 11 U.S.C. § 365 and 1123 by requiring that the Trustee perform the necessary prerequisites to the sale. There is nothing in the record to suggest that the leases had been

rejected prior to their assumption by the plan and therefore the Bankruptcy Court was correct in implementing the express language and directive of the confirmed plan.

Appellants also argue that Florida law allows a party to refuse performance of a contract from an assignee. Although the appellants are correct in their statement of Florida, law, they misconstrued its relevance in this instance, Title 11 U.S.C. § 365(f) provides for the assignment of an unexpired lease notwithstanding a provision restricting assignment. Although section 365(c) excuses a party from accepting performance from an assignee if the party does not consent, that section has been interpreted to apply only to personal service contracts or contracts based upon personal trust or confidence. *See In re Boogaart of Florida, Inc.*, 17 B.R. 480, 487 (S.D. Fla. 1981) (citing 2 Collier on Bankruptcy, § 365.05 at 365-34 (15 ed. rev. 1981); *In re Taylor Manufacturing Co. Inc.*, 6 B.R. 370) Bkrtcy. N.D. Ga 1980)). Since the lease of personal property like those at issue are not contracts for personal services or contracts that involve trust or confidence, that exception to assignment is inapplicable.

Title 11 U.S.C. § 365(b) (1) (A) requires that at the time of the assumption, the trustee must cure or provide adequate assurance that he will cure any default in the unexpired lease. The appellants contend that no such cure was proffered and therefore the attempted assumption is void.

Under section 365(b) (1) (A), "an immediate cure of arrearage or a tender is no longer absolutely required, provided 'adequate assurance' for the same is made in accordance with § 365." *Executive Square Office Building v.*

O'Connor and Associates, Inc., 19 B.R. 143, 148 (N.D. Fla. 1981). Neither is the "adequate assurance" measured by a strict yardstick. In *In re Boogaart*, 17 B.R. 480, the court determined that the record demonstrated the proposed assignee would generate the necessary income to meet its obligations to lessors and therefore the leases were assignable. The court in *In the matter of Southern Biotech, Inc.*, 37 B.R. 311, 314 (M.D. Fla. 1983), determined that the prompt curing requirement was met when it found that the trustee seeking to assume the contract would in all likelihood be able to cure within eight months. The Bankruptcy Court did not err in finding that confirmation of the plan was adequate assurance that the trustee would cure. In addition, as that court noted, the consolidated estates of the debtors were adequate for the purpose of curing the default and were "adequate assurance" of the trustee doing so.

THE AMOUNT PAYABLE TO THE LESSOR

The Bankruptcy Court found that the lessor is entitled to rent from March 1, 1983, to October 10, 1985. The court also found that the lessor is entitled to late charges and interest on the past due rent. Because this court finds that the Bankruptcy Court correctly determined that the leases were assumed and purchase options exercised, it further agrees with the calculation of the overdue rent, late charges, and interest. Neither did the court err in its finding that the purchase option price is the fair market value on the date of the exercise of the option with interest.

For the foregoing reasons, this court affirms the order of the Bankruptcy Court in its entirety.

DONE AND ORDERED at Miami, Florida this 4th day of April, 1988.

/s/ C. Clyde Atkins
C. CLYDE ATKINS
United States District Court

CC: Theodore Gould
Robert Musselman
Scott Sheftall
Vance Salter
S. Harvey Ziegler
Thomas Noone
Irving Wolff
Albert Edelman
Herbert Stettin
Robert Mark

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI CENTER JOINT VENTURE, et al.,
Appellants,

v.

THE BANK OF NEW YORK,
Appellee.

CASE NO. 87-1317-CIV-ATKINS

MIAMI CENTER LIMITED PARTNERSHIP, et al.,
Appellants,

v.

THE BANK OF NEW YORK,
Appellee.

CASE NO. 87-1583-CIV-ATKINS

ORDER ON APPELLANT'S MOTION FOR CLARIFICATION

(Filed May 2, 1988)

THIS CAUSE is before this court on the appellant Miami Center Limited Partnership's motion for clarification of an order of April 4, 1988. Accordingly, it is

ORDERED AND ADJUDGED that the motion is *GRANTED* and the order of this court dated April 4, 1988 is clarified as follows:

The appeal before this court concerned an order of the bankruptcy court resolving claim no. 502. Claim no. 502 was filed by the Miami Center Joint Venture against the debtor, Miami Center Limited Partnership for

$14,417,679.00. The bankruptcy court allowed the claim against the debtor in the amount of $14,557,754. This court affirmed that order and therefore allows the claim against the debtor Miami Center Limited Partnership in the amount of $14,557,754.00, an amount that does not take into account any interest that may have accrued in the meantime.

This court, in resolving the question of adequate assurance, noted that courts no longer measure adequate "by a strict yardstick." *See* Order Affirming Bankruptcy Court's Order on claim No. 502 at 5. This conclusion was based upon a survey of the "adequate assurance" that has satisfied past courts faced with this question. Among those cited included *In re Boogaart*, 17 B.R. 480 in which the court looked at the record and found that the proposed assignee would generate the necessary income to meet it obligations to the lessors, and *In the matter of Southern Biotech, Inc.*, 37 B.R. 311 (M.D. Fla. 1983), in which the court found that the likelihood that the trustee assuming the contract would be able to cure within eight months was adequate assurance. In light of the court's flexible approach to finding adequate assurance of a cure, this court affirmed the bankruptcy court's determination that the confirmation of the plan and the consolidated estates of the debtors were adequate assurance that the trustee would cure the default. *See* Order Affirming Bankruptcy Court's Order on Claim NO. 502 at 5 (citing Order on claim No. 502 (MCJV Leases A and B to MCLP) at 5).

DONE AND ORDERED at Miami, Florida this 29th day of April.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT
JUDGE

CC: Counsel of record

APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)	
	)	CASE NO. 84-01590-BKC-TCB
HOLYWELL CORPORATION, et al.,	)	CHAPTER 11
	)	
Debtors.	)	
	)	

ORDER ON CLAIM NO. 502
(MCJV LEASES A AND B TO MCLP)

Claim No. 502 was filed two years ago by Miami Center Joint Venture against the debtor, Miami Center Limited Partnership (hereafter "lessor" and "lessee") for $14,417,679. It is based upon two May 1981 leases of furnishings, fixtures and equipment specifically purchased to equip the lessee/debtor's luxury hotel. The leases contain a purchase option. Objections to the claim were heard April 16, 1987. The claim is allowed in the amount of $8,445,436.

The objectors are the Bank of New York (C. P. No. 811) and the lessee (C. P. No. 1582a). Both challenge the amount of the claim. The claim presumes that these two executory contracts were assumed under the provisions of 11 U.S.C. §§ 365 or 1123(b) (2) and that the option to purchase contained in the leases has been exercised. The Bank's objection accepts these presumptions and disputes only the amount due under the leases. The lessee, however, argues that the leases were rejected as a matter of

law and that title to the property remains in the liquidating trustee standing in the lessor's shoes. The liquidating trustee takes the same position. I address first, therefore, the contentions of the lessee and the liquidating trustee.

Assumption of the Leases and Election to Purchase

The deadline for the assumption of executory contracts in chapter 11 cases is the confirmation of the plan. § 365(d)(2). They may be assumed in the plan. § 1123(b)(2). The confirmation order constitutes approval of the assumption. That is what happened here. The plan directed the liquidating trustee to sell the leased furniture, furnishings and equipment together with the hotel for a total price of $255.6 million with the trustee's warranty of title. The trustee did so. The sale was consummated and the personal property is in the possession of the purchaser where it has been since the October 1985 closing. The assumption became effective on the effective data of the confirmed plan, October 10, 1985.

Section 365(b)(1) provides that if there has been a default in an assumed executory contract, the contract may not be assumed unless:

> "at the time of assumption of such contract or lease, the trustee (A) cures, or provides adequate assurance that the trustee will promptly cure, such default; (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such contract or lease."

The objectors argue that the leases have not been assumed because the default was not cured at the time of assumption and remains uncured today.

The provisions quoted above are obviously provided for the benefit of the obligee in the executory contract or lease, in this case the lessor. This benefit may be waived and I find that the lessor has waived its entitlement to prompt cure. This finding is based upon the lessor's conduct since March 1, 1983, the commencement of leases through confirmation in August 1985, to the present.

Lessee has never made a payment and the lessor has never demanded payment. When the lessee filed for bankruptcy in August 1984, lessor could have sought an early election to assume or reject under § 365(d) (2), could have demanded adequate protection under § 361, or could have requested stay relief under § 362 (d) to enforce its remedies under the leases. It did nothing.

In April 1985 the lessee/debtor moved for leave under § 365(a) to assume the two leases (C. P. No. 583). The day before the hearing set to consider the motion, the lessor, the lessee, the Bank and Olympia & York (a major creditor of the non-debtor lessor) jointly moved for a postponement of the hearing. (C. P. No. 666). That motion was granted. (C. P. No. 694). The hearing was postponed to the final hearing of Adversary Proceeding 85-0566.

In that action, the Bank sought a determination that the leases were not "true leases" but were security agreements which had never been properly perfected and, therefore, were unenforceable. The parties now before me then agreed that the amount of lessor's claim should not be fixed until the Bank's contention was resolved.

My decision rejecting the Bank's contention in June 1985 (51 B.R. 56) was appealed. It was affirmed by the district court a year later, in June 1986. Both my decision and the district court decision expressly assumed assumption of the leases and the exercise of the purchase option by and through the confirmed plan.

My order of June 1985 set a hearing the next month to fix the amount necessary to cure the lease defaults and to consider the effect of my decision on the then pending chapter 11 plan. All of the parties then and thereafter again urged deferral of the fixing of the cure cost, as well as the lessee's motion to assume, until resolution of the hotly contested issue in the Adversary Proceeding and, thereafter, the equally hotly contested issues presented by the confirmation in August of the Bank's plan.

The confirmation order has since been reviewed by two divisions of the district court. Lessor has been a party to each appeal and has consistently recognized the assumption of the leases, exercise of the purchase option and conveyance of the leased property by the trustee to the purchaser now in possession. The lessor and its major creditor, Olympia & York, have concentrated their attention on plan provisions which they saw as a possible threat to the lessor's eventual recovery of the payment stipulated in the leases. This court has now been directed by the district court to fix the amount due:

> "On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould). O&Y and the Bank continue to dispute the interest each party holds

> concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceedings have had which would alter the general partners' 50% interests." (C. P. No. 1593 (Atkins Memorandum Opinion No. 85-3230 (S.D. Fla. March 24, 1987)).

Quite obviously payment to the lessor could not be made before determination of the amount due. The lessor's continued stipulation for and acquiescence in deferral of that liquidation constitutes waiver of its entitlement to prompt cure and its consent to delayed payment. It will not now be heard to deny assumption of the leases, exercise of the purchase option, vesting of title in the trustee and conveyance of that title to the trustee's vendee on the ground that it was not paid promptly. *Lindsey v. Department of Labor (In re Harris Management Co., Inc.)*, 791 F.2d 1412 (9th Cir. 1986).

Without question, lessor is entitled to adequate assurance that the trustee will promptly cure the default and pay the purchase option price. The confirmation of the plan constituted a finding of adequate assurance that the trustee could do so. The assets of the substantively consolidated estates of the debtors are now and always have been adequate for that purpose.

Only the reluctance of the trustee's counsel to fix the amount due and marshal the necessary assets to pay the obligation has delayed payment, a delay endorsed by every affected party.

I presume all parties have felt it prudent to await the conclusion of appellate review of the confirmation order before implementing this feature of the plan, although

the trustee immediately implemented the rest of the plan and was directed by this court to do so.

The trustee is once again directed to implement the confirmed plan as expeditiously as is possible.

I do not overlook the Order of May 23, 1985 (C. P. No. 696) approving lessee's assumption of the leases at issue here. The ex parte Order submitted by the lessee, is inconsistent with the earlier ex parte Order deferring the issue (C. P. No. 694). The execution of either Order could have been an inadvertent error on my part. I have no independent recollection of either at this date. But both Orders went to all affected parties and have remained unquestioned and unchallenged for two years.

I hold that if the leases were not assumed May 23, 1985, as this record reflects, they were assumed three months later by the confirmed plan and it makes no difference to the rights of any affected party when the assumption occurred.

Nor do I overlook the lessor's exercise on August 8, 1986 (Ex. 10) of its option to exercise, pursuant to paragraph 24 (b) of the leases, the lessee's option to purchase the leased property. That election appears justified and effective unless, as I have concluded, this option was exercised a year earlier in the confirmed plan. Once again, as I see it, it makes no difference to the rights of any party when this option was exercised.

The significant effect of these two events is that neither the lessor nor the lessee is now in a position to dispute a finding that the leases have been assumed and the option to purchase has been exercised. All that

remains is to fix the amount payable and to make payment. That, of course,is the purpose of this Order.

The Amount Payable to the Lessor

The lessor is entitled to the stipulated rent from March 1, 1983 to October 10, 1985, the effective date of the confirmed plan. Lessor and lessee differ in the calculation of this sum only because the lessee prorates the October rental and the lessor does not. I agree with the lessee and find the rent due to be $6,112,318.

The lease stipulates late charges consisting of penalty interest, 4% above the Citibank prime rate. The Bank argues that the lessor has waived or is estopped to claim the penalty interest, relying upon the events I have summarized above. I disagree. There is no inconsistency between lessor's claim of penalty interest and its consent to a delay in the fixing of and the payment of the sums due it. The failure of the lessor to demand and enforce earlier settlement of its account did not mislead or prejudice the Bank, the lessee, the trustee or any other party. I find no basis for waiver or estoppel. The lessor is entitled to interest on the past due rent computed in accordance with paragraph 15 of the leases to the date of payment. That sum calculated through April 1987 is $2,478,818.

The purchase option price is the fair market value of the leased property on the date the option was exercised, October 10, 1985, the effective date of the plan. I find that value to be $4,986,900.

The lessor is entitled under the provisions of paragraph 15 to interest upon the purchase option price from

October 10, 1985 to the date of payment. That sum calculated through April 1987 is $979,718.

Adding the foregoing figures, the lessor's claim is allowed in the total amount of $8,445,436 together with interest upon that sum commencing May 1, 1987 to the date of payment in accordance with paragraph 15, that is to say at 4% above the prime rate charged by Citibank.

The Respective Interests of O&Y and the Trustee in this Claim

Lessor's claim is payable, of course, to Miami Center Joint Venture, a Florida partnership consisting of O&Y and the debtor, Gould. The trustee is vested with all of Gould's property rights and interests to the extent necessary to satisfy the confirmed plan with respect to these substantively consolidated estates. Therefore, the trustee is entitled to and has asserted his right to set off against this obligation of the estate Gould's partnership entitlement to the lessor's claim against the estate. Judge Atkins has directed that this court resolve that issue and has then specified the order in which the assets available to the trustee should be applied to the estate's net obligation to O&Y. Memorandum Opinion No. 85-3230 at p.18 (March 24, 1987).

The parties, as is characteristic of this case, disagree as to the respective interests of O&Y and Gould. Although several of the parties have argued this issue in this hearing, it is premature in the entry of this Order upon objections to the claim of Miami Center Joint Venture.

The present hearing was scheduled by the court on its own initiative before the release of Judge Atkins'

decision. This additional issue was not then anticipated and no notice has been given that it would be considered at this hearing. I am not certain that all the pertinent facts have been presented. Under the provisions of Bankruptcy Rule 7001, a proceeding:

> "to determine the validity, priority, or extent of a lien or other interest in property" in this court should be presented as an adversary proceeding. The Liquidating Trustee is, therefore, directed to file and serve within 14 days an appropriate adversary complaint presenting to this court the issue directed by Judge Atkins to be resolved in this court. Under the normal practice of this court, the necessary parties may answer and the matter will be scheduled for trial in approximately 30 days after the complaint is filed. I intend to comply with Judge Atkins' directive as promptly as possible.

DONE and ORDERED in Miami, Florida this 8th day of May, 1987.

/s/ Thomas C. Britton
Chief Bankruptcy Judge

Copy to:

Attorney for Debtors
Fred H. Kent, Jr., Esquire
CARLTON, FIELDS, et al.
1400 Florida National Bank Bldg.
225 Water Street
Jacksonville, FL 32202-4486

Special Counsel to Debtor
Antonio Martinez, Esquire
SHUTTS & BOWEN
1500 Edward Ball Building
100 Chopin Plaza
Miami, FL 33131

Attorney for Liquidating Trustee
Irving M. Wolff, Esquire
HOLLAND & KNIGHT
1200 Brickell Avenue
P. O. Box 015441
Miami, FL 33101

Attorneys for Bank of New York
Vance E. Salter, Esquire
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, FL 33131

and

S. Harvey Ziegler, Esquire
KIRKPATRICK & LOCKHART
1428 Brickell Avenue
Miami, FL 33131

and

Thomas F. Noone, Esquire
EMMET MARVIN & MARTIN
48 Wall Street
New York, NY 10005

Attorney for Miami Center Limited Partnership
Raymond Bergan, Esquire
WILLIAMS & CONNOLLY
839 17th Street, NW
Washington, DC 20006

Attorneys for O&Y Equity Corp.
John W. Kozyak, Esquire
KOZYAK, TROPIN & THROCKMORTON
2850 Southeast Financial Center
200 South Biscayne Blvd.
Miami, FL 33131

and

Albert I. Edelman, Esquire
PARKER, CHAPIN, et al.
1211 Avenue of the Americas
New York, NY 10036

Attorney for Twin Development Corp.
Scott D. Sheftall, Esquire
FLOYD, PEARSON, et al.
One Biscayne Tower, 25th Floor
Miami, FL 33131-1868

Liquidating Trustee for the Miami Center Liquidating Trust
Mr. Fred Stanton Smith
c/o Keyes Company
100 N. Biscayne Blvd.
Miami, FL 33132

President of Twin Development Corporation
Mr. Theodore B. Gould
Holywell Corporation
2564 B Ivy Road
Charlottesville, VA 22901

APPENDIX G

MIAMI CENTER LIMITED PARTNERSHIP, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation, Plaintiffs-Appellants,

v.

BANK OF NEW YORK, Defendant-Appellee.

MIAMI CENTER CORPORATION and Chopin Associates, Plaintiffs-Appellants,

v.

BANK OF NEW YORK, et al., Defendants-Appellees.

Nos. 86-5286, 86-5386.

United States Court of Appeals, Eleventh Circuit.

March 10, 1988.

Debtors in Chapter 11 Bankruptcy case brought consolidated appeals from decisions of the United States District Court for the Southern District of Florida, No. 85-3225 CIV-SMA, Sidney M. Aronovitz, 59 B.R. 340, which affirm bankruptcy court's confirmation of major creditor's proposed reorganization plan and from later decision of the District Court, No. 85-0228 CIV-WMH, Wm. M. Hoeveler, J., which dismissed debtor's separate actions against major creditor. The Court of Appeals, 820 F.2d 276, dismissed appeals. Motion for rehearing was denied 826 F.2d 1010. On petition for rehearing and rehearing en banc, the Court of Appeals, Godbold, Senior Circuit Judge, held that: (1) District Court should have

dismissed as moot appeal of confirmation of plan, and (2) issues adjudicated by Bankruptcy Court judgment could not be reexamined by district court in his consideration of whether to dismiss debtor's fraud/Racketeer Influenced and Corrupt Organization Act case.

Petition for rehearing and rehearing en banc denied.

Before ANDERSON, Circuit Judge, SWYGERT* and GODBOLD**, Senior Circuit Judges.

ON PETITION FOR REHEARING AND REHEARING EN BANC BY APPELLANTS AND PETITION FOR REHEARING BY APPELLEES

(Opinion June 29, 1987, 11 Cir., 820 F.2d 376).

GODBOLD, Senior Circuit Judge:

On petition for rehearing by appellants/debtors we entered an order on September 8, 1987, 826 F.2d 1010 (11th Cir. 1987), in which we attempted to correct what we believed was an error in our opinion, 820 F.2d 376 (11th Cir. 1987). In this order we reaffirmed our conclusion that these consolidated appeals should be dismissed

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*Honorable Luther M. Swygert, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation. Judge Swygert did not participate in the consideration of these petitions. This order is entered by the quorum. See 28 U.S.C. § 46.

**_See_ Rule 34-2, Rules of the U.S. Court of Appeals for the Eleventh Circuit.

and denied appellants' petition for rehearing. Subsequently the appellants/debtors filed a petition for rehearing en banc, and the appellees filed a petition for rehearing with respect to the September 8 order.

It now appears that our correction was wrong. We have, therefore, gone back to square one and have reviewed the record and the numerous briefs. There are two appeals before us. No. 86-5286 is an appeal from an order of the district court entered in an appeal to it affirming two orders of the bankruptcy court. This appeal to us is the primary subject of this opinion. We hold that the district court should have dismissed the appeal to it as moot, and we remand to the district court with instructions that it do so. No. 86-5386, a related case, is an appeal to us from an order of the district court dismissing a civil action for damages brought in the district court by the debtors in No. 86-5286 against the major creditors. Our disposition of this appeal is controlled by out decision in No. 86-5286. In No. 86-5386 we affirm the district court's dismissal.

The appellants are five Chapter 11 debtors – an individual debtor, Theodore B. Gould, and four other debtors owned, controlled, or dominated by Gould. All have been involved in development of the Miami Center project, a modern thirty-five story hotel and office building structure, joined by a restaurant and shopping complex, plus a parking garage, situated at a bay-front site in downtown Miami, Florida. The Bank of New York financed the construction of the project and is the principal debtor. Its mortgage fell into default, and it began foreclosure. The five debtors filed voluntary petitions for bankruptcy, and

the bankruptcy court consolidated the estates. The debtors continued in possession.

The debtors and the bank filed competing reorganization plans. The creditor committees and individual creditors overwhelmingly approved the bank's amended plan and rejected the debtors' plans. The bank's amended plan included a proposal that the estates of the five debtors be consolidated. The bankruptcy court entered two orders that are central to No. 86-5286. On July 23, 1985 it approved substantive consolidation of the debtors' estates and overruled debtor's objections to that aspect of the reorganization plan. The court noted:

> The consolidation of the five estates is for the purpose of allowing all available funds and assets of the estates to be used in accordance with the Bank's Amended Plan, if confirmed, to pay all allowed creditor's [sic] claims.

The court reserved consideration of whether all other aspects of the reorganization plan entitled it to confirmation.

On August 8, 1985 the bankruptcy court considered whether to confirm the debtors' plans or the bank's plan. The debtors' major objections to the bank's plan were, first, that the assets were worth substantially more than the bank was willing to pay. Second, the Gould interests objected to the provision for consolidation of estates that had been approved in the July 23, order. The court rejected debtors' plans and approved the bank's. In its order, reported as *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy.S.D.Fla.1985), it noted that an application for rehearing and reconsideration of the July 23 order was pending; the court denied the application for rehearing.

Under the amended reorganization plan that was confirmed a liquidating trustee would be appointed and would take charge of the property. The Bank of New York would acquire the Miami Center property from the trustee, together with the furniture, fixtures, and equipment therein, for $255,600,000, a valuation based upon an MIA appraisal.[1] This purchase would be funded through cancellation of the judgment lien held by the bank (approximately $240 million)[2], plus any new cash necessary to come up to the $255.6 million figure. In addition, the bank agreed to release to the trustee $30 million realized from the sale of unrelated property located in Washington, D.C. that had been owned by some of the debtors; this cash was additional collateral held by the bank and subject to its lien.

Moreover, the bank was required to set aside $14 million, backed by surety bonds, to protect the rights of creditors affiliated with Gould, who had been found in a separate order to be lessors of equipment and fixtures located in Miami Center that had been included with the sale to the bank. This order was the subject of a separate appeal. Should the bond ultimately have to pay the lessors for the FF & E under this arrangement it would be entitled to seek reimbursement from the estate pursuant to a trustee's certificate.

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[1] The furniture, fixtures and equipment had been obtained from affiliates of the debtors pursuant to what the district court, in a separate order, had found to be leases.

[2] In separate proceedings the principal and interest due under the mortgage had been established, and the bank had been granted a final judgment for these amounts.

Also the plan provided that certain creditors affiliated with the Gould interests would be "equitably subordinated" to claims of other creditors with lower priority because these Gould-affiliated creditors were "insiders."

The debtors had filed in the U.S. District Court a separate suit for damages charging that in connection with its loan the bank had committed fraud and various RICO violations. The approved reorganization plan provided that this case, which the bank asserted was a chose in action of the bankruptcy estate and thus due to be under the control of the trustee, was to be dismissed by the trustee.

Debtors moved in the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing the bankruptcy court granted a stay conditioned upon debtors posting a bond in the amount of $140 million, based upon the court's estimate that an appeal would take a year. In October 1985, on review, the district court reduced the amount of the bond to $50 million, on the assumption an appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. The debtors appealed the bond ruling to this court, which dismissed for lack of jurisdiction. The debtors did not post a bond, and, beginning October 11, 1985, the trustee and the bank set about immediately to consummate the reorganization plan as approved. The trustee conveyed to the bank's designee, a land trust, title to Miami Center and its furniture, fixtures and equipment. The bank gave up its judgment lien, and, in addition, paid approximately $13.6 million of new money, to make up the total consideration of $255.6 million. Also, it released the $30 million of additional cash collateral. The

trustee began making payments to 400-plus creditors of the five estates.

On appeal to the district court the debtors attacked the consideration order and the confirmation order. They asserted that: the necessary bases for the consolidation order were not proved; various of their claims were improperly subordinated to claims of general creditors; the bankruptcy court failed to have a hearing on valuation; the reorganization plan improperly required the trustee to dismiss the separate suit filed by debtors in the federal district court; the reorganization plan discriminated against mechanics and materialmen and some unsecured creditors; and the bankruptcy court denied debtors' due process.

In November 1985 the bank and the trustee moved to dismiss the appeal to the district court as moot because no stay of the reorganization plan had been obtained.

The district court (Sidney M. Aronovitz, D.J.) held that the consolidation and confirmation orders were "intertwined and interdependent" and that the order approving the plan of reorganization "includes inferentially the effect of the [earlier] Order of Substantive Consolidation." With respect to both orders, however, the court held that the bankruptcy court had failed to enter sufficient findings of fact and sufficient explanations of its legal reasoning to support adequate appellate review. The court remanded the matter to the bankruptcy court with directions for it:

> to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to

> provide this Court with an adequate basis to decide the instant appeal on the merits.

Order, p. 12.

Despite its conclusion that there were insufficient findings to support appellate review, the court proceeded to address the appellees' motion to dismiss the appeal for mootness.[3] It looked to the mootness doctrine formerly stated in Bankruptcy Rule 805:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

It noted that although the mootness standard was not carried forward in Rule 8005, which supplanted Rule 805 in 1983, it is widely accepted in case law, including *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984). Relying upon a Ninth Circuit case, *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir.1977), the court held that where a debtor appeals from several orders, some of which are orders approving the sale of property, and fails to obtain a stay, the debtor may proceed with the appeal of orders not involved in the sale. Applying this principle, the district court concluded that the appeal of the consolidation order was not moot because it was not an order of sale, and because, after remand, should it [the district court] rule in favor of

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[3] The trustee had filed a mootness motion but was not a party to the appeal.

debtors on their appeal of the consolidation order, the court could grant meaningful relief to them by reversing that order and "that portion of the confirmation plan of reorganization which incorporates this order." Order, p. 15. Therefore, it held that it would decide the validity of the consolidation order on the merits after receipt of findings of fact and conclusions of law that it ordered entered by the bankruptcy court.

The court then turned to the confirmation order. It did not address the status of the bank as a good faith purchaser within the meaning of the mootness cases. Nor did it speak to its holdings that the consolidation order, though standing alone was not an order approving the sale of property, was an order "involved with the sale" and indeed was "intertwined and interdependent." Rather, as appears from the portions of its order quoted below, the court noted that the purchaser was a designee of the bank and within its jurisdiction, and it analyzed its ability to give "effective relief" by considering whether it was capable of undoing what had been done. The court stated that it could reverse its subordination of debtors' claims and return them to their pre-confirmation status; it could require the trustee to reinstate the separate suit that debtors had filed; and it could review alleged procedural flaws in the valuation proceedings leading up to confirmation and in other unspecified proceedings. The court put its finger on the central dispute:

> This appeal is primarily directed at recovering title to the Miami Center property held by the bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above [the rulings in the confirmation order].

Ms. Op. p. 17.

> As to this central matter, the court held:
>
> [S]hould this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone.

Id. at p. 18.

* * *

> Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million ($30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors.

The court also found that it had had the unusual opportunity to observe the substantial consummation of the reorganization plan and that its "fairness, feasibility and propriety" had been verified by these occurrences: administrative claims had been paid or reserved; secured claims had been paid in full; class 3 claims had been paid in full; undisputed claims in classes 4 through 6 had been paid in full and funds reserved for disputed claims; several disputed claims had been compromised, saving the estates millions of dollars; there remained sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (many of which were unliquidated).

Finally the court went on to hold:

> No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

With respect to consolidation, the court found the facts, and applied the controlling law, at length. It found that in most respects creditors had not objected to consolidation, that the debtors would not be substantially prejudice by consolidation, and that the hundreds of creditors (many not represented by counsel) should not be required "to engage in a shell game" in attempting to determine which of the interrelated debtors involved in the Miami Center project would be able to pay them. The difficulty in tracing the obligation of claims against the affiliated creditors was, the court held, "completely attributable to the labyrinth that Gould has created."

The bankruptcy court confirmed the orders it previously had entered. The matter came back to the district court with the bankruptcy court's elaborate findings and conclusions. Without addressing the mootness issue the court considered the merits and entered an order on March 20, 1986. It held that the confirmation order before it for review consisted of the initial confirmation order [entered August 8, 1985], as amended by the findings of fact and conclusions of law entered by the bankruptcy court on remand. It reiterated that the confirmation order

and the consolidation order were "intertwined and interdependent." With respect to each issue relating to confirmation, including valuation, the district court reviewed the facts as found by the bankruptcy court and the applicable law and found no error. Following this careful, point-by-point review, the district court affirmed the August 8 confirmation order, as amended by the bankruptcy court's order on remand, and affirmed the order approving consolidation.

Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand.[6]

The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but this provision applies only to the sale of the debtor's property by the trustee pursuant to § 363(b) or (c). Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation. All parties agree that in this case we look for guidance to the case law.

The Eleventh Circuit, like other circuits, has recognized the continuing viability and applicability of the mootness standard in situations other than transfers by a

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[6] *See In re Bel Air Associates, Ltd.*, 706 F.2d 301 (10th Cir.1983) (no explicit holding by bankruptcy court on good faith purchaser issue. District court remanded to the bankruptcy court for findings, and that court ruled good faith purchaser status applied. District court adopted this determination and dismissed the appeal).

trustee under § 363(b) or (c). *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir.1984); *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir.1985); *In re Matos*, 790 F.2d 864 (11th Cir.1986).

In *Sewanee* the mortgagees/creditors were permitted to foreclose, both district and circuit courts refused stay pending appeal, and the property was sold at foreclosure to the creditors. On appeal debtors asserted the sale should be rescinded and the property returned to them. Looking to the case law, this court dismissed the appeal as moot. *Markstein* is similar to *Sewanee*. No stay was obtained. Mortgagees/creditors purchased the property themselves at foreclosure. On appeal the debtors sought to have the sale rescinded and the property returned, or other equitable relief. This court held that it was powerless to rescind the sale. It ordered a limited remand to the district court with direction that it make specific findings as to the amount of the mortgage debt and to determine whether the bankrupt estate was entitled to excess, if any, of the foreclosure bid over the debt. The court noted that the appellant had been unable to cite, and it had been unable to locate, "any case where a court has granted relief in the situation where property of a debtor was sold at foreclosure to a good-faith purchaser after the debtor had failed to obtain a stay of foreclosure pending appeal." But it had found no case where the amount of the mortgage debt, and of the excess, if any, had not specifically been determined, thus it remanded on these issues. 763 F.2d at 1327 n.1. No such issue is involved in the present case. With respect to the purpose of the mootness rule, the court held:

> This rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers relied.

Id. at 1327.

Matos followed in the same channel. The bankruptcy court permitted foreclosure, debtors were granted a stay conditioned on filing a bond, which they did not file. The mortgagee/creditor bought the property at foreclosure. This court dismissed the appeal as moot. We said:

> It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal. *Markstein v. Massey Associates,* 763 F.2d 1325 (11th Cir.1985); *In re Sewanee Land, Coal & Cattle, Inc.,* 735 F.2d 1294 (11th Cir.1984). This rule of law, which is premised upon considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant relief on appeal even if the purchaser of the property is a party to the appeal, is fully applicable to this case. Accordingly, the appeal must be dismissed as moot. (Note omitted.)

790 F.2d at 865-66.

The "good faith purchaser" is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim. *In re Bel Air Associates, Ltd.,* 706 F.2d 301 (10th Cir.1983); *Greylock Glen Corporation v. Community Savings Bank,* 656 F.2d

1 (1st Cir.1981). Knowledge of claims asserted in a pending appeal does not deprive a purchaser of good faith status. *In re Dutch Inn of Orlando, Ltd.*, 614 F.2d 504 (5th Cir.1980).

When the present case was returned to the district court following remand, the record before the district court included the finding that the bank was a good faith purchaser. It included the detailed findings that the plan was fair, feasible, and proper, and that it had been substantially consummated. And it included the finding that it was legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo. All these findings were affirmed. The debtors urge, on several grounds that the mootness standard should not apply:

> (1) The mootness rule has no applicability because there has been no transfer to a third party. This argument ties in with the district court's emphasis on the fact that the sale was to a designee of the bank which was within the jurisdiction of the court. No transfer to a third party was involved in *Sewanee, Markstein, or Matos;* in each of those cases the purchaser at foreclosure was the mortgagee/creditor, just as the bank here is the purchaser from the liquidating trustee. Other cases rejecting the "not a third party" argument include *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir.1985); *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 4 (1st Cir.1981) ("[T]he fact that the bank was both the seller and purchaser of the property, and a party to the dismissed appeal does not affect its status under Rule 805. The rule does not distinguish between mortgage holders and other potential purchasers of encumbered property. It is designed to give finality to orders of

the bankruptcy court that have not been stayed pending appeal. . . . No less than any other potential purchaser, the bank was entitled to bid upon the Greylock Glen property with the assurance that its title to the property would not be affected by appellate review months or even years later.")

(2) The bank has never been held to be a purchaser in good faith. On remand the bankruptcy court held the bank was a good faith purchaser, and the district court affirmed the bankruptcy court's findings and affirmed the confirmation order, as amended by the bankruptcy court's findings and conclusions. No factual argument is advanced why the bank is not entitled to good faith purchaser status except that the purchaser is a designee of the bank and within the jurisdiction of the court, an argument already rejected above.

(3) The mootness principle is inapplicable because the debtors do not seek return of the property but only modification of the plan, or, restating, they do not attack the sale but only matters that do not directly relate to the sale.

(4) Mootness does not apply where the purchaser has not taken irrevocable steps in reliance on the purchase.

Points (3) and (4) require us to look beyond *Sewanee*, *Markstein* and *Matos*. These three Eleventh Circuit cases concern single sales at foreclosure of property for which in each instance there was a good faith purchaser. In that confined context the cases are a firm application by this circuit of a broader principle that mootness is appropriate where a court cannot give effective relief. A reorganization case, however, may sweep within its ambit more than a discrete and consummated sale to a good faith

purchaser. Within a penumbra of the reorganization plan outside of discrete consummated sales there may be aspects of the reorganization that are not moot.[7] Cases of this nature include *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir.1977); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir.1986); and *In Re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981). These cases tell us that in considering whether in a reorganization case matters not directly related to sales are within the mootness rule, the court may consider the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances. *AOV*, 792 F.2d at 1148-49. The court will not, however, allow a "piecemeal dismantling" of a reorganization plan. *Id.* at 1149. In *AOV* the court recognized a "strong presumption" of mootness. *Id.* The court may consider whether relief granted by the court could implicate or have an adverse effect on non-party creditors and will affect the re-emergence of the debtor as a revitalized entity. *Id.* In *Roberts Farms* the court considered whether the property transactions "stand independently and apart from the plan of arrangement," and found that "the many

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[7] The possibility of effective relief for matters unrelated to consummated sales does not, however, subsume the central principle that finality of judgments and certainty are to be protected where there have been sales to good faith purchasers. In this case the district court considered as a global question whether it could grant effective relief and concluded that it could do so because it had the power to undo the sale to the bank, restore the property and possession to the debtor, and set aside the sale provision of the reorganization plan. This analysis stood the law of mootness on its head.

intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand *solely* upon the order confirming the plan of arrangement for court approval and confirmation of the transactions." 652 F.2d at 797. The court concluded that to deny mootness and reverse would "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.* The Eighth Circuit, *In re Information Dialogues,* 662 F.2d 475 (8th Cir.1981), refers to the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. In *Matter of National Homeowners Sales Service Corp.,* 554 F.2d 636 (4th Cir.1977) the Fourth Circuit, in sustaining good faith purchaser status and dismissing the appeal as moot, relied upon substantial investment that had been made upon reliance of good title to the property having vested in the purchaser.

The debtors acknowledge that the plan of reorganization has been substantially consummated, but, they say, it remains not completed in several respects, as follows: The trustee is claiming substantial additional sums from the bank as a result of examination and audit of the bank's interest charges and other closing adjustments in the sale of the Miami Center property. If the bank must pay the lessors for FF & E, it will seek repayment from the estate pursuant to the trustee's certificate, which will deplete sums available to Gould-affiliated creditors. Some disputed claims have yet to be resolved. It is unknown

whether claims of Gould-affiliated creditors will be paid in full because some have been assigned a junior priority.

We turn, then to the relief that the debtors seek and the relationship between it and the reorganization plan. The debtors now say that, although they do not agree with the validity of the sale to the bank, they do not seek to overturn it; indeed, they specifically say that they do not want the property back. They want the sale to stand but the property revalued to a higher figure and the sale price adjusted accordingly. They seek cancellation of the trustee's certificate issued to the bank to cover its exposure with respect to the FF & E. They want a realignment of priorities of claims that will place some of their claims ahead of other unpaid creditors and give some "super priority" ahead of the bank as mortgagee. They want reinstatement of the separate suit they filed against the bank.

The debtors recognize that the relief they request may require the bank's putting up additional cash to preserve its position as purchaser; if so, the bank must sweeten the pot. If it is unwilling to do this, it may have to fall back on its rights as mortgagee.

These prayers for relief must be set against what the bank bargained for, and received, as part of the reorganization plan, and the consequences to the plan of granting the prayers. The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation the bank surrendered a claim to $5 million-$6 million of interest at

default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.

Closing the sale to the bank stopped the running of interest at approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totalling approximately $30 million. The trustee appeared before the district court when after remand, it heard argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its

entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful suggestion of how the bank can get back its $12.5 million or get back the $30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.

The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorney fees for its defense.

All of this demonstrates that the consequences of what debtors seek strike at the sale to the bank and the reorganization plan as a whole. As in *Roberts Farms* the sale of the primary asset does not "stand independently and apart from the plan of arrangement," but rather "the many intricate and involved transactions . . . were contemplated by the plan of arrangement . . . and stand *solely* upon the order confirming the plan of arrangement." 652 F.2d at 797.[8] It is "impossible to fashion effective relief"

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[8] The district court found twice that the consolidation order and the confirmation order were intertwined and independent.

for the bank. *Id.* Granting the remedies the debtors seek would "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.*

The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation. The district court was required to dismiss the appeal as moot.

We turn to No. 86-5386: The district court held that the bankruptcy court had the power to order the trustee to dismiss the separate fraud/RICO case because: (1) it was a chose in action which was part of the debtors' estate; (2) on remand the bankruptcy court had conducted a cost/benefit analysis of the value of the suit and concluded that its value was nil; (3) evidence adduced at a post-remand hearing showed that releases previously signed by debtors barred their pursuing the civil action on principles of collateral estoppel.[9]

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[9] The bankruptcy court held that it was within the scope of its authority in making this determination because the debtors' right to pursue this action was a matter concerning the administration of the estates, and/or a counterclaim by the estate against persons filing claims against the estate, and/or confirmation of plans, and/or other proceedings, affecting the liquidation of the assets of the estate, and therefore constituted a "core proceeding."

Judge Aronovitz entered his order affirming the consolidation and confirmation orders on March 20, 1986. On April 30, 1986 District Judge Hoeveler dismissed the fraud/RICO suit, quoting the grounds set out above and, accordingly, entered a dismissal as "an administrative necessity . . . compelled by the decision of the Bankruptcy Court below and the affirmation of that decision by Judge Aronovitz."

Had the appeal to the district court on the consolidation and confirmation orders been dismissed as moot, as it should have been, the judgment of the bankruptcy court in that appeal would have become final. The issues adjudicated by that judgment would then have been precluded from reexamination by Judge Hoeveler in his consideration of whether to dismiss the fraud/RICO case. These same consequences will ensue now upon the entry of an order by Judge Aronovitz dismissing the appeal from the bankruptcy court as moot.

The debtors contend that as a matter of separation of powers the bankruptcy court could not require the district court to give up its jurisdiction. This is not what happened. In October 1985, some five months before Judge Aronovitz affirmed the bankruptcy court, the liquidating trustee, on behalf of the debtors, filed a "stipulation" for dismissal with prejudice of the district court case. All parties asked that consideration of the trustee's "motion" to dismiss be postponed until the bulk of the bankruptcy proceedings had been resolved.

After Judge Aronovitz entered his ruling and plaintiffs failed to post an appeal bond to stay the implementation of the reorganization plan pending appeal to this

court, the liquidating trustee filed a new motion requesting the court to order dismissal of the district court case. Thus, the liquidating trustee, found by the bankruptcy court to be in control of the separate case as an asset of the debtors' estates, was directed to dismiss the separate suit, he sought to have it dismissed, and Judge Hoeveler responded by entering a dismissal. Dismissal of lawsuits that are assets of the estate is a not-unfamiliar feature or reorganization plans. Debtors' suggestion that the bankruptcy court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense. The underpinnings of the bankruptcy court's order to the trustee will be finally determined by the bankruptcy court order once the finality of that order is established by the mootness of the appeal to the district court. As now recognized, though retrospectively, the district court's order dismissing the separate suit, as requested by the trustee, will be correct and will be due to be affirmed.

Conclusion

We VACATE the order of September 8, 1987 appearing at 826 F.2d 1010.

In No. 86-5286 we VACATE the judgment of the district court affirming the consolidation order and the confirmation order of the bankruptcy court and REMAND that case to the district court with instructions to dismiss the appeal to it from the bankruptcy court as moot.

Forthwith upon entry of the order by the district court, as directed in No. 86-5286, the judgment in No. 86-5386 shall stand AFFIRMED.

The petition for rehearing by the Bank of New York is DENIED. The petition for rehearing by the appellants is DENIED.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Bank is DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Case No. 85-3230-Civ-ATKINS]

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,
Appellants,

vs.

THE BANK OF NEW YORK,
Appellee.

MEMORANDUM OPINION

Olympia & York Florida Equity Corporation (O&Y), as a general partner of Miami Center Joint Venture (MCJV), appeals from the bankruptcy court's Confirmation Order confirming a Chapter 11 plan of reorganization initiated by five debtors. Competing plans of reorganization were submitted to the creditors who rejected the debtors' plans and adopted the Bank of New York's (Bank's) plan. O&Y/MCJV asserts that its claim was improperly classified under this plan.

Pursuant to 11 U.S.C. § 1129(b), the court may confirm a plan even though a class has rejected it if all other requirements of § 1129(a) have been fulfilled and "the plan does not discriminate unfairly, and is fair and equitable," with respect to that class. *Id.* O&Y/MCJV, as the

only creditors in Class 7, voted to reject the plan. Therefore, the question presented is whether the plan fulfilled the requirements of § 1129(b).

I. STATEMENT OF THE CASE

A. *The Parties and Their Respective Interests*[1]

The five debtors include the Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, A Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium," and an adjoining parking garage (collectively known as the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

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[1] Attached as court appendices I and II are two diagrams which set forth, graphically, the relationship between the various entities involved in this bankruptcy proceeding.

MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the existing Miami Center Project. Gould and O&Y, as the only partners, originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners has precluded further construction or development.

Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by the bankruptcy court, and have been active for the Holywell, MCLP, and MCC estates.

B. *General Background Information*

During the summer of 1984, the Bank initiated foreclosure proceedings in state court after declaring the debtor's mortgage loans on the Miami Center to be in default. The debtors quickly responded by filing their voluntary petitions for reorganization on August 22, 1984. During the Chapter 11 reorganization proceedings, the debtors and the Bank filed competing reorganization plans. The various creditors' committees and individual creditors rejected the debtors' plans and adopted the Bank's plan, although it was rejected by the impaired classes 7-9. This plan was then confirmed by the bankruptcy court over the Class 7 creditors' objection pursuant to 11 U.S.C. § 1129(b) (1979).

Several appeals were taken from the various bankruptcy proceedings. Two of these appeals were closely related to this one. In one, *Bank of New York v. Olympia & York Florida Equity Corp.*, No. 85-3430-Civ-ATKINS (June 23, 1986), the Bank sought reversal of a final judgment and related orders of the bankruptcy court in an adversary proceeding. The bankruptcy court found that certain lease agreements relating to furniture, fixtures, and equipment (FF&E) within the Miami Center project were "true leases." After reviewing the bankruptcy court's orders and the lease agreements, I affirmed. This action was significant because it formed the foundation for O&Y/MCJV's priority claims as the owner/lessor of the FF&E.

Another appeal went before Judge Aronovitz in which he was asked to review the same confirmation order as it related to other classes under the Bank's plan. After reviewing the confirmation order, he found that the bankruptcy court failed to enter clear and concise findings of fact and conclusions of law which would support its order; therefore, he remanded the case. Following the proceedings on remand, Judge Aronovitz affirmed the amended confirmation order as it related to those aspects of the Bank's plan on appeal before him.

Having resolved the "true lease" issue which established the nature of O&Y/MCJV's claim as to the FF&E, I carefully reviewed the confirmation order as it related to Class 7 of the plan. Like Judge Aronovitz, I found that is was necessary to remand the case for a more detailed order clearly elucidating the basis for the bankruptcy court's decision to place O&Y/MCJV's claim in class 7 of

the plan.[2] On November 10, 1986, the bankruptcy court concluded its remand proceedings and entered its Order on Remand in which it adopted the proposed findings of fact and conclusions of law submitted by the Bank.[3] Thus, the initial Confirmation Order, as amended by the adoption, *nunc pro tunc*, of the explicit findings of fact and

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[2] Remand proceedings were appropriate under *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206 (5th Cir. 1983). There, the district court evaluated the record to find sufficient findings of fact to satisfy each of *Mobile's* three elements for equitable subordination. The Fifth Circuit remanded the case saying:

> These findings, though perhaps inherent in the bankruptcy court's ruling, were not enunciated. Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings *by the bankruptcy court* on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder.

Id. at 212 (emphasis added).

[3] O&Y/MCJV challenges the propriety of the bankruptcy judge's verbatim adoption of the Bank's proposed findings and conclusions, and asserts that the "blanket adoption" of one party's findings and conclusions indicates that the court failed to conduct a thorough, independent analysis of the evidence and the law. While this practice has been severely criticized, *see Cabriolet Porsche-Audio v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), it is permissible. *See Anderson v. Bessemer City*, 470 U.S. ___, 105 S.Ct. 1504 (1985). Nevertheless, such a practice invites particularly close scrutiny of the findings in light of the record.

conclusions of law, constitutes the foundation for O&Y/MCJV's appeal.[4]

C. *The Nature of the O&Y/MCJV Claim*

The appeal before this court concerns only the rights and claims of MCJV, prosecuted by O&Y as its general partner, and managing venturer relating to the FF&E leases. Originally, O&Y filed separate claims as a creditor; however, in conjunction with the Trustee's consent to entry of the final modified arbitration award, O&Y issued a formal release of all its own claims against debtor Gould.[5] O&Y/MCJV asserts that it has priority claims for the market value of the FF&E, the cumulative defaulted rental payments and late charges accrued from March 1,

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[4] On remand, the bankruptcy court correctly determined that it was not called upon to alter or enhance the record. I simply wanted a more detailed explanation concerning the basis for the court's approval of the plan. Therefore, the record, as it stood at the approval of the plan. Therefore, the record, as it stood at the time of confirmation, must support the amended findings.

[5] O&Y and Gould initiated arbitration proceedings against each other in 1982 based upon their conflicting views regarding the operation of MCJV. The bankruptcy court permitted O&Y to pursue its rights under the relevant arbitration statutes and to proceed to an award in a court of competent jurisdiction, although it recognized that these proceedings could affect O&Y's and Gould's interests in MCJV. The final modified award was executed by the arbitrators on June 30, 1986 and entered as a judgment in the Florida Circuit Court on July 10, 1986.

1983 to October 10, 1985, and defaulted rental payments and late charges from October 10, 1985.[6]

II. DISCUSSION

This appeal presents many complex legal issues. Over 400 parties struggled through the bankruptcy proceedings, under that court's supervision, attempting to make the best of an undesirable situation. The plan has been substantially consummated, and appears to have been successfully implemented.[7] Nevertheless, O&Y/MCJV vehemently objects to the placement of its claim concerning the FF&E into class 7 of the plan. Conversely, the Bank argues that this classification was eminently correct, because it satisfied all statutory requirements under the Code.

A. *Standard of Review*

A district court must accord substantial deference to the bankruptcy court's findings of fact, and should reverse only when they are "clearly erroneous." *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013.

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[6] MCLP was supposed to make rental payments to MCJV under the lease agreement as of March 1, 1983. On October 10, 1985, the trustee transferred his interest in the FF&E to the Bank and its designated transferee.

[7] The claims classified under the plan from Class 1 to Class 6 have either been paid in full or funds have been reserved for the disputed items. In addition, in the most recent reports, the Liquidating Trustee estimated that approximately $3 million will be available to satisfy the remaining claims.

Moreover, the bankruptcy court's balancing of equities in analyzing the plan's fairness is a factual process, therefore, the court's determination on this point is also subject to the "clearly erroneous" standard of review. *Danning v. General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.)*, 779 F.2d 480, 482 (9th Cir. 1985). Conclusions of law, however, are subject to plenary review. *Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980) (hereinafter referred to as "Multiponics").

B. *Classification Under The Code*

A Chapter 11 plan of reorganization may involve the sale of all or substantially all of the debtor's assets. 11 U.S.C.A. § 123(b) (4) (1979). After all, one of the primary goals of the bankruptcy code is to effectuate an equitable distribution of the debtor's assets in satisfaction of its debts. *Benjamin v. Diamond (In re Mobile Steel Co.,)*, 563 F.2d 692, 698 (5th Cir. 1977). To achieve the goal, the plan must group the claims or interests by classes. 11 U.S.C.A. §§ 1122, 1123 (1979)[8]; Bankruptcy Rule 3013. "The classes which hold priority claims must be specially organized and full payment is mandatory although the payment may be deferred." R. Aaron, *Bankruptcy Law Fundamentals*, § 1.04 at 1-22 (1986) (footnote to citations omitted).

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[8] 11 U.S.C.A. § 1122(a) provides:

Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(Continued on following page)

The Bank urges that its plan is acceptable because the classification of the MCJV lease claims is fair and equitable, and does not discriminate unfairly under § 1129(b).[9] Furthermore, the Bank asserts that O&Y/MCJV's claim is not substantially similar to other claims or interests, because 50% of any distribution on MCJV's claim would go to debtor Gould. However, having reviewed the facts and the relevant legal principles, I conclude that the Bank is incorrect.

(Continued from previous page)

11 U.S.C.A. § 1123 provides (in pertinent part):

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall –
>
> (1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2) or 507(a)(7) of this title and classes of interests;
>
> (2) specify any class of claims or interests that is not impaired under the plan;
>
> (3) specify the treatment of any class of claims or interests that is impaired under the plan;
>
> (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
>
> (5) provide adequate means for the plan's implementation. . . .

[9] 11 U.S.C.A. § 1129(b)(1) provides:

> (b)(1) Notwithstanding section 510(g) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with

(Continued on following page)

Under the Bank's plan, O&Y/MCJV's claim cannot be paid until all claims filed by other creditors not affiliated with Gould have been satisfied. In effect, this classification structure means that even general unsecured creditors will be paid before O&Y/MCJV. To justify its treatment of the O&Y/MCJV claim, the Bank relies heavily on the factual premise that any distribution on the O&Y/MCJV claim will benefit Gould. However, this premise is incorrect. Any payment to O&Y/MCJV based on the FF&E leases *would not* benefit debtor Gould. In fact, Gould's share of any MCJV proceeds, rents, or profits are available to the liquidating trustee, since "*all* legal or equitable interests of the debtor in property as of the commencement of the case," or any "[p]roceeds, . . . rents, or profits of or from property of the estate . . . " become part of the bankruptcy estate. 11 U.S.C.A. § 541(a) (Supp. 1986) (emphasis added). *See also In re Wallen*, 43 Bankr. 408, 409 (D. Idaho 1984); *Houchen v. Gadberry (In re Gadberry)*, 30 Bankr. 13, 14 (C.D. Ill. 1983); *Dominican Fathers of Winona v. Dreske (In re Dreske)*, 25 Bankr. 268, 271 (E.D. Wis. 1982); *Don/Mark Partnership v. James B. Nutter & Co., (In re Don/Mark Partnership)*, 14 Bankr. 830,

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respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

832 (D. Colo. 1981); *cf. Missouri v. Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981) (court held that debtor's 2.3% fractional interest in deposited grain was sufficient to bring all property under the bankruptcy court's jurisdiction). In short, any interest Gould held in MCJV became part of the bankruptcy estate upon the commencement of this case.

The Bank's position is incorrect for another reason. The plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements, I disagree.

Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. *See Scherk v. Newton (In re Rocky Mountain Fuel Co.)*, 152 F.2d 747, 750-51 (10th Cir. 1945); *Seidel v. Palisades-on-the Desplains (In re Palisades-on-the Desplaines)*, 89 F.2d 214, 217 (7th Cir. 1937). *See also* 11 U.S.C.A. § 1129(b) (1979). A party submitting a plan of reorganization has considerable discretion to determine the proper classification of claims and interests according to the unique factual circumstances presented; however, " . . . there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise." *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986). The result is not surprising – considerable discretion is permitted in determining the proper classification of claims and interests; however, if the plan unfairly creates too many or too few classes, or violates basic priority rights,

the court cannot confirm the plan. *See id.* Thus, classification principles cannot be employed to effectuate the subordination of valid claims. *See In re Martin's Point Limited Partnership,* 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. § 1129(b).

One final point merits discussion under the "classification" issue. In its initial brief, the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim. *Id.* at 727 (" . . . a claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to ~~be~~ treated equally.").

C. *Claims of An Insider*

In support of the plan's classification structure, the Bank emphasizes O&Y/MCJV's status as an insider.[10] The Bank argues that appellant's status is significant for two reasons. First, the Bank urges that insider creditors may not be given the same priority as unsecured creditors. *In re Toy & Sports Warehouse, Inc.,* 37 Bankr. 141, 152 (Bankr. S.D.N.Y. 1984) *In re Economy Cast Stone Co.,* 16 Bankr. 647, 651 (Bankr. E.D. Va. 1981). Alternatively, the Bank asserts that an insider creditor's claims must be closely scrutinized to determine whether equitable subordination is

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[10] MCJV is an insider because it is a "partnership in which the debtor is a general partner." 11 U.S.C.A. § 101(28)(A)(ii) (Supp. 1986). O&Y is an insider because it is a "general partner of the Debtor." 11 U.S.C.A. § 101(28)(A)(iii) (Supp. 1986).

warranted. *Estates v. N&D Properties, Inc. (In re N&D Properties, Inc.)*, 799 F.2d 726, 731 (11th Cir. 1986); *Multiponics*, 622 F.2d 709, 714 (5th Cir. 1980). If the claimant is an insider, the party seeking equitable subordination need present only "material evidence of unfair conduct," and need not provide proof of, "more egregious conduct such as fraud, spoilation or overreaching." *Estes* at 731.

O&Y/MCJV responds with two arguments. First, appellant contends that it is not an insider in the legal connotation of the term. Second, appellant assumes a "fallback" position arguing that the mere invocation of the term "insider" without more, does not serve to meet any standard or test required by law for equitable subordination.

The code is clear regarding the definition of an insider. In this case, it is beyond question that O&Y and MCJV are insiders. See 11 U.S.C.A. § 101(28)A(ii) and (iii). However, the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. *See Estes* at 731; *Multiponics* at 713; *Huffman* at 212. Further, appellant asserts that even where the claimant is an insider the proponent of the plan bears the burden of presenting material evidence in inequitable and unfair conduct damaging the creditors. *See Multiponics* at 714; *Estes* at 731.

Two cases are particularly relevant regarding the subordination of an insider's claim. In *Huffman*, the fifth Circuit found that "Huffman was an insider." *Id.* at 211.

Nevertheless, the court indicated that the three-prong test of *Mobile* still had to be satisfied. "Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder." *Id.* at 212.

Very recently, the Eleventh Circuit examined this issue in *Estes*, and followed the teachings of *Mobile* and *Huffman*. The court expressly stated that three elements must be established before a claim may be equitably subordinated. *See Estes* at 731. Where the claimant is an insider, the trustee's burden of proof in establishing evidence of unfair conduct is somewhat lessened, but the claim is not automatically subordinated. *See id.*[11]

D. *Equitable Subordination*

The principle of subordination is firmly established in bankruptcy proceedings. This doctrine permits the court to lower the priority of a valid claim to achieve an equitable result when the claimant has been guilty of improper conduct.[12] *Collier on Bankruptcy* ¶ 510.02 (15th

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[11] Significantly, I note that Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. *See* S. Rep. No. 989, 95th Cong., 2 Sess. 74 (1978); H. R. 31, 95th Cong., 1st Sess. (1975).

[12] Subordination is not the same as disallowance. "If a creditor's misconduct has been directed toward the debtor . . . the claim . . . is disallowed." 3 *Collier on Bankruptcy*, ¶ 510.02 (15th Ed. 1986). Subordination is employed when a claim is valid, but the claimant's conduct is such that equitable considerations require it to be paid after other claims have been satisfied. *See id.*

Ed. 1986). Although the doctrine was judicially created,[13] it has now been codified within the bankruptcy code. Currently, the relevant provision is found at 11 U.S.C.A. § 510(c) which provides:

> § 510 Subordination
>
> * * *
>
> (c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may –
>
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest, or
>
> (2) order that any lien securing such a subordinated claim be transferred to the estate.

Section 510(c) authorizes subordination when the court finds that an equitable rememdy is required. Established case law, however, continues to be significant because § 510(c) indicates that its application should follow equitable principles. *See 3 Collier on Bankruptcy* ¶ 510.01 (15th Ed. 1986). To resolve subordination situations, the Fifth Circuit established a three part test to determine when a claim or interest should be subordinated. See *Mobile* at 700. This test has been expressly adopted by the Eleventh Circuit. *See Estes* at 731. The three elements of the test include:

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[13] Under the previous Act, courts subordinated creditor's claims based upon the bankruptcy court's grant of equitable jurisdiction. *See Pepper v. Litton*, 308 U.S. 295 (1939).

> (1) that the claimant has engaged in inequitable conduct;
>
> (2) that the conduct has injured creditors or given unfair advantage to the claimant; and
>
> (3) that subordination of the claim is not inconsistent with the Bankruptcy Code.

Id. (citation omitted).

In proving the elements for equitable subordination, one must first determine the status of the claim holder.

> The burden and sufficiency of proof required are not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. Once the trustee meets his burden, the claimant then must prove the fairness of his transactions with the debtor of his claim will be subordinated. If the claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoilation, or overreaching, and prove it with particularity.

Id. (citations omitted). Additionally, the trustees, or other moving party, must show the extent of any inquiry or unfair advantage to determine the extent to which the claim should be subordinated. The claim should only be subordinated to the extent necessary to offset the harm caused by the unfair conduct. *See Benjamin*, at 701, "For example, if a claimant guilty of misconduct asserts two claims, each worth $10,000, and the injury he inflicted on the bankrupt or its creditors amounted $10,000, only one of his claims should be subordinated." *Id.* at 701. Finally, the evidence must show which creditors were disadvantaged, because a valid claim should only be subordinated

to the claims of the disadvantaged creditors. *See Estates* at 732-33.

In this case, the bankruptcy court appears to have relied upon three facts to fulfill *Mobile's* tripartite test. First, the court imputed Gould's acts of misconduct to O&Y/MCJV as a matter of partnership and agency principles. Second, the court found that O&Y/MCJV was responsible for MCLP's undercapitalization. Third, the court found that O&Y substantially contributed to MCJV's and Gould's financial difficulties, to the detriment of other creditors, by failing to provide or arrange for the financing of Phases II and III of the Miami Center.

O&Y/MCJV challenges all of these facts and asserts that there is no semblance of proof of wrongful conduct of the claimant/appellant affecting the debtors' creditors. First, O&Y/MCJV argues that all of Gould's acts of misconduct were outside the course and scope of the partnership's business. In fact, Gould's conduct was *against* O&Y and the partnership's interest. Therefore, appellant urges that Gould's misconduct cannot be used to subordinate its claim. Second, O&Y/MCJV suggests that the theory of undercapitalization of MCLP is outrageous and incomprehensible. Appellant insists that MCJV was the victim of, not a contributor to, MCLP's poor financial situation. Finally, appellant states that everyone recognized that the construction of phases II and III of the Miami Center would have subjected Gould to even greater losses and further indebtedness. Thus, appellant's failure to provide financing for further development could not have injured any of the debtor's creditors.

After carefully considering the facts, I conclude that the evidence was insufficient to satisfy the elements of equitable subordination. First, I find that the court erred when it imputed Gould's acts of misconduct to O&Y/MCJV. These acts were clearly outside the ordinary course of the business of the partnership and not authorized by O&Y. *See Fla. Stat. Ann.* § 620.62 (1977).[14] Second, I simply cannot accept appellee's theory of undercapitalization. Perhaps the best indication that the FF&E lease was valuable was that the trustee was required to obtain title to the FF&E under the plan. Therefore, it is unreasonable to believe that the valuable FF&E lease agreements injured any of the debtor's creditors, even if I could somehow attribute MCLP's financial situation to O&Y/MCJV. Finally, I find that insufficient evidence was offered to prove that O&Y's failure to provide further financing hurt any creditors or gave O&Y an unfair advantage. Under the circumstances, O&Y's decision seems sound.

III. CONCLUSION

After carefully reviewing the amended confirmation order, I find that the court erred in confirming the plan

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[14] *Fla. Stat. Ann.* § 620.62 (1977) reads as follows:

> *Partnership bound by partner's wrongful act.* – When loss or injury is caused to a person, not a partner in the partnership, or any penalty is incurred by a wrongful omission *of a partner acting in the ordinary course of the business of the partnership or with the authority of his copartners,* the partnership is liable for it to the same extent as the partner so acting or omitting to act. (emphasis added).

which placed the O&Y/MCJV lease claim in class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the class 7 creditor. None of the theories presented by the Bank justify the subordination of O&Y/MCJV's claim. I must, therefore, remand the case so that the bankruptcy court can determine O&Y's share of the claim.

On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould).[15]

Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:

(1) First, from the cash which remains available to the trustee;

(2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and

(3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

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[15] O&Y and the Bank continue to dispute the interest each party holds concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceeds have had which would alter the general partners' 50% interests.

For all of the reasons expressed in this opinion, the order of confirmation is reversed and remanded for further considerations not inconsistent with this opinion.

DONE AND ORDERED at Miami, Florida, this 24 day on March, 1987.

/s/ C. Clyde Atkins
C. CLYDE ATKINS
United States District Judge

cc: John Kozyak, Esq.
Albert I. Edelman, Esq.
Scott D. Sheftall, Esq.
Raymond W. Bergan, Esq.
Fred H. Kent, Esq.
Vance E. Salter, Esq.
Irving M. Wolff, Esq.

[Court Appendix I and II Omitted in Printing]

APPENDIX I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

IN RE: HOLYWELL CORP., *et al.*

Debtor(s).

Adv. No. 85-0566-BKC-TCB-A

THE BANK OF NEW YORK

Plaintiff,

v.

OLYMPIA & YORK FLORIDA EQUITY CORP.
O & Y EQUITY CORP., THEODORE B. GOULD,
MIAMI CENTER JOINT VENTURE

Defendants.

MEMORANDUM DECISION

The issue here is whether two agreements executed in May 1981, in which Miami Center Joint Venture leased certain personal property to Miami Center Limited Partnership are "true leases" or are in effect conditional sales

and therefore "leases intended as security". I concluded that they are true leases.

The personal property is furnishings, fixtures and equipment that were purchases to equip a hotel in Miami. The building is owned and operated by the lessee which is a chapter 11 debtor in this court. The leased personal property cost $7.8 million.

The lessor joint venture was formed two months before the lease. Its two general partners are T. B. Gould, another chapter 11 debtor in this court, and Olympia and York Florida Equity Corporation (O & Y), which loaned the lessor the $7.8 million that funded the purchase of the equipment. These two partners have been constantly at each other's throat in various courts since shortly after the leases were executed, but they are on the same side here.

Gould is not only of the general partners of the lessor joint venture, he also controls three other related chapter 11 debtors in this court.

The plaintiff band was the construction lender for the hotel and office buildings. It is owed $50 million on its mortgage and is the largest creditors of the five related debtors which are dominated by Gould. Its chapter 11 plan to liquidate these five debtors' assets and distribute the proceeds is presently under consideration by this court along with competing plans presented by Gould.

The bank seeks a determination that the two leases are not true leases. The four defendants urge the contrary. The matter was tried on May 30.

If the leases are "true leases", the leases will be "assumed" under 11 U.S.C. § 365 under each of the competing plans. If reorganization fails, a liquidating trustee will also, as a practical matter, require the leased equipment. Assumption requires that the lease defaults be promptly cured. The accrued, unpaid rent to date is between $6.1 and $13 million depending on when the leases commenced, a disputed point not yet addressed by the parties. If the leases are found to be "true leases", no one would receive a windfall or gain any other inequitable advantage.

If on the other hand, the two leases are not "true leases," as the bank argues, the bank will come out of reorganization at least $10 million ahead of what it stands to recover if the two leases are given effect. This would be a complete windfall for the bank. The principal loser will be O & Y, which provided the purchase money for the equipment. No rent has ever been paid on the leases. O & Y's only recourse is against the lessor, which would lose title to the equipment and would itself become the holder of a worthless claim against the lessee for an unperfected security interest. Similarly, O & Y's claim against the lessor would be a claim as an insider, which would be behind all the claims of other creditors. O & Y's claim would be rendered virtually worthless.

The predicate for the bank's contention is UCC § 1-201(37), *Fla. Stat.* § 671.201(37):

> "(37) 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation . . . Unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest, but a consignment is in any event subject to the provisions on consignment sales

> (s.672.326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

A "security interest" if not perfected becomes unenforceable against the lessee here, which is a chapter 11 debtor-in-possession. 11 U.S.C. § 1107(a). These leases expressly prohibited the assertion of perfection of any security interest against the lessee.

The leases were executed for each party by Gould in his capacity as general partner of each entity. He denies any intention to create anything other than a true lease. It is undisputed that Metropolitan Life, the prospective permanent lender for the buildings, insisted that the equipment be leased and there be no perfected security interest against the property. It also reviewed and approved the leases, as did the plaintiff bank, before they were executed. Metropolitan's motives do not appear in this record. It has not been suggested that Gould had anything to gain by leasing the equipment rather than by purchasing it with borrowed funds collateralized by the equipment. I am satisfied that his only motive was to satisfy Metropolitan.

Until this action was filed six weeks ago, no one has suggested that the leases are not true leases any time during the four years they have been in existence. Indeed, the bank's disclosure statement supporting its

plan describes and treats the leases as leases, not as disguised conditional sales.

Neither the history nor the form of the documents, the direct testimony of the parties as to their intent, nor the contemporaneous acts of the parties support the bank's contention that the parties intended a conditional sale rather than a true lease. It is the bank's argument that the terms of the leases compel the conclusion that the parties in fact intended a conditional sale.

In *American Standard Credit Inc. v. National Cement Co.*, 643 F.2d 248, 261 (5th Cir. 1981) the court noted that the question whether particular transactions are "true leases" or "leases intended as security" is one of the most hotly litigated topics in commercial law, that there is considerable conflict among the various jurisdictions, and that federal courts are bound to apply the interpretations of the applicable State court "insofar as such interpretation may be discerned." It dealt with an Alabama lease.

Florida law is controlling here and the only reported case from a Florida court is *U. C. Leasing, Inc. v. Barnett Bank of West Florida*, 443 So.2d 384 (Fla. Dist. Ct. App. 1983). This decision affirmed a trial court's holding that a bank's perfected security interest in certain equipment was superior to a purported lessor's claim which had not been recorded as a security agreement. The trial court found the equipment lease to be not a "true lease" but rather a "secured transaction."

In this reported decision, neither the lessor nor the bank stood to gain a windfall. Each was the innocent victim of a merchant who executed separate inconsistent

agreements, first to lease from the lessor then to pledge the leased equipment to the bank for a loan.

Neither this decision nor any I have seen applied UCC § 1-201(37) where the result is to give one party a windfall at the expense of an innocent party. The legislative purpose was to protect the lessee's other creditors from fraud and deception. There is nothing in the record before me that suggests that anyone was misled or deceived by the leases in question here. Certainly the bank was not misled or deceived in anyway.

UCC § 1-102(1), *Fla. Stat.* § 671.102(1), requires that:

> "This code shall be liberally construed and applied to promote its underlying purpose and policies."

To construe and apply the code to produce the result urged here by the bank would defeat the purpose and policy of the code. It is a shield, not a sword.

Furthermore, the Florida court identified features of the transaction before it which promoted its conclusion, at least four of which are absent in out case.

1. There, the option price given the lessee to acquire title was "nominal" about 10% of the initial price. In our case the option price is the *greater of the unrecovered original cost or the market value* at the time the option is exercised. The only evidence of market value is an appraisal eight months ago of $7.7 million, 99% of the purchase price. I find that plaintiff has failed to carry its burden of showing that the option price would be "nominal" at any time during the 60-month life of these leases.

2. There, the initial payments, monthly payments, and option prices were readily equated to the current rate

of interest and the lessor admitted that the payments were determined by the related to the cost of funds and interest rates. Of course, every lessor must consider and try to recoup its investment, but in our case, there was no down payment, no such congruency, and no such admission as was before the Florida court. We have two leases executed on the same day involving the same kind of property, but which produce two different rates of return for the lessor.

3. There, the lessor required a guaranty of payment. There is none here.

4. There, the lessee was granted the investment tax credit. Here, the lease gives it to the lessor which has used it.

U. C. Leasing, therefore, is readily distinguishable from the case before this court.

In *American Standard Credit*, the Fifth Circuit reversed the district court's holding that the equipment lease in question there was not a true lease. The seven factors which the court found to be crucial to its conclusion are each paralleled here. *Id.* at 266.

I have made no reference to defendants' argument that plaintiff is estopped or has waived its right to make the argument it has made here, because I do not find the elements of either defense in this record. No party justifiably relied to its detriment on any conduct of the plaintiff and there is no clear evidence of an intent on the part of the bank to give up this contention.

The bank has asked, in the alternative, that this court define what must be paid to the lessor to assume and

cure the lease default. The parties have neglected this issue and a further hearing will be held on Monday, July 8, 1985, at 9:30 a.m., in Courtroom 1406, 51 S.W. 1 Avenue, Miami, Florida, to consider (a) motions for rehearing, (b) to hear the parties on the amount required to cure the lease defaults, (c) to hear any other issue necessary to the entry of a judgment in this adversary proceeding and, (d) to consider the effect of this decision on the pending, chapter 11 plans.

DONE and ORDERED at Miami, Florida, this 24th day of June, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies
VANCE SALTER, ESQUIRE
STEEL HECTOR & DAVIS
Attorney for Plaintiff
SCOTT SHEFTALL, ESQUIRE
FLOYD, PEARSON, ET AL
Attorney for Miami Center J.V.
JOHN KOYZAK, ESQUIRE
Attorney for O & Y Florida
FRED H. KENT, JR., ESQUIRE
Attorney for Theodore Gould
Emmet Marvin & Martin
Attorneys for BONY
MEYER, WEISS, ROSE, ET AL
Attorneys for BONY

APPENDIX J

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	:	Chapter 11
HOLYWELL CORPORATION, et al., Debtors.	:	Case Nos. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB

LIQUIDATING TRUSTEE'S POST-HEARING SUMMARY RE MCJV CLAIM

The Liquidating Trustee, as one of the participants in the proceedings who is reserved the right under the confirmed Plan, respectfully submits this brief summary as to the status of the record, the application of the law, and the amendment to the contract of sale, to support the conclusion that title to the FF&E chattels involved in Leases A and B at all times remained in MCJV and did not pass to any other entity.

The Liquidating Trustee deems it necessary to submit this memorandum because his counsel took the position in open court and throughout these proceedings subsequent to October 10, 1985, that title to the chattels involved in the MCJV FF&E Leases A and B did not pass to the Debtor MCLP or to the Liquidating Trustee at any time.

In addition, this memorandum will deal with the effect of the Final Modified Award in the arbitration proceedings and this Court's previous ruling abstaining from adjudicating the O&Y/Gould controversy.

I. *TITLE DID NOT PASS*

This Court made reference to the status of the record and oral representations of counsel for the respective parties (other than the Liquidating Trustee) which indicated that the Debtor obtained an order from this Court authorizing its acceptance of the executory contracts, i.e., the MCJV FF&E Leases A and B.

The record reflects that by Joint Motion executed and filed by the Bank of New York, the Debtors, MCJV and O&Y, the original motion filed by the Debtors to accept or reject executory contracts was modified to remove from the Court's consideration the rejection of the FF&E Leases A and B. See Court Paper 666 dated and filed March 16, 1985, a copy of which is annexed hereto as Exhibit 1.

By its Order of May 20, 1985 (Court Paper 694, a copy of which is attached hereto as Exhibit 2) the assumption or rejection of the MCJV FF&E Leases A and B was deferred until May 31, 1985. Thus, the Court did not have a pending motion in connection with the acceptance or rejection of the MCJV FF&E Leases A and B before it on May 23, 1985 upon which to rule. Therefore, the Court could not have disposed of this particular matter on May 23, 1985. Hence, the enumeration attached to the Court's Order of May 23, 1985 was erroneous, since the MCJV FF&E Leases A and B were not deleted from said listing.

See Court Paper 696, a copy of which is attached hereto as Exhibit 3.

It is respectfully submitted to this Court that there appears to be some confusion as to the monthly rental charges and the value of the chattels if purchased. The monthly rent charges are specific and concise and are set forth in the contracts, and they are easily ascertainable. See Court Paper 781, Memorandum Decision dated June 24, 1985, a copy of which is annexed hereto as Exhibit 4.

In accordance with the provisions of § 365(b)(1), there is a statutory prohibition against assumption of executory contracts or unexpired leases by the debtor, unless the trustee [debtor in possession] cures or provides adequate assurance that it will *promptly* cure such default; and further, either compensates or provides adequate assurance that compensation will promptly be made to a party other than the debtor for any actual pecuniary loss to such party resulting from such defaults; and finally, provision must be made for adequate assurance of future performance under such contract or lease.

No order has been entered by the Court to comply with the statutory provisions (see Memorandum Decision, Court Paper 781); hence the MCJV FF&E Leases A and B stood rejected at the time of confirmation of the plan.

The foregoing conclusion is supported by this Court's Memorandum Decision of June 24, 1985 (Exhibit 4). A careful reading of this Memorandum Decision indicates that as late as June 24, 1985 the Court found

> The bank has asked, in the alternative, that this court define what must be paid to the lessor

> to assume and cure the lease default. The parties have neglected this issue and a further hearing will be held on Monday, July 8, 1985,* at 9:30 a.m., in Courtroom 1406, 51 S.W. 1 Avenue, Miami, Florida, to consider (a) motions for rehearing, (b) to hear the parties on the amount required to cure the lease defaults, (c) to hear any other issue necessary to the entry of a judgment in this adversary proceeding and (d) to consider the effect of this decision on the pending chapter 11 plans. (Court Paper 781, Memorandum Decision, pages 7,8)

*No further hearing was ever held.

In view of the law and the status of the record at the time of confirmation, as well as the Effective Date, the MCJV FF&E Leases A and B as a matter of law stood rejected. The confirmed Plan precluded the acceptance of the MCJV FF&E Leases A and B by the Liquidating Trustee. The confirmed Plan provides:

> XI. *EXECUTORY CONTRACTS*
>
> A. The executory contracts and unexpired leases listed in Exhibit D and any other existing executory contracts or unexpired leases relating to Miami Center Phase I with any party not affiliated with any of the Debtors are hereby, BNY shall modify this Plan to add or to delete executory contracts or unexpired leases from Exhibit D.
>
> B. Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. § 365, or paragraph A of this Article all executory contracts and unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation

> Order. Claims for damages resulting from the rejection of executory contracts shall be filed with the Court no later than thirty (30) days prior to the date of the Confirmation Order or be forever barred and precluded from consideration or participation in distributions from the estate. Claims for damages resulting from executory contracts which are deemed rejected as of the date of the Confirmation Order in accordance with this Article shall be filed with the Court or be forever barred and precluded from consideration or participation in distributions from the estate. Objections to any such Claims shall be filed by the Trustee or the Creditors Committees with the Bankruptcy Court within twenty (20) days after the Claim in question has been filed.

With the foregoing status of the record and no specific order in compliance with 11 U.S.C. § 365, the MCJV FF&E Leases A and B stood rejected on October 10, 1985 and, therefore, title never did pass to MCLP or the Liquidating Trustee.

The Bank of New York insisted that under the confirmed Plan, which included confirmation of the contract of sale, that it be delivered a Bill of Sale warranting and conveying title. The Liquidating Trustee, because of the status of the record and the applicable law, insisted that he be protected from warranting title and conveying the same under the Bank's proposed Bill of Sale. Therefore, in order to expedite the closing, the contract of sale annexed to the confirmed Plan was amended to include paragraphs 24(k) and 25. Said amendment provided:

> 24. . . .
>
> (k) The provisions of this Agreement shall survive delivery of the Deed hereunder.

> 25. The purchaser is fully familiar with the status of the record in the Bankruptcy Proceedings and the property rights vested in the Seller in accordance with the United States Bankruptcy Code and the Plan, and thereby said Purchaser recognizes that the Seller, Miami Center Liquidating Trust, can deliver, in accordance with this Agreement, only such title, items, chattels and matters that it has received by operation of law from the Debtors and Debtors in Possession, and that this Agreement is governed by said limitations.

The language in the amendment is clear. What the Liquidating Trustee delivered to the Bank was possession, and though the bill of sale includes a warranty of title, the modification, which limits what the Liquidating Trustee delivered, survived the delivery of the Deed.

It is, therefore, humbly suggested to this Court that when it observed that title passed, it was in error. The status of the record, the provisions of the Code and the amendment to the sale contract attached to the confirmed Plan, preclude the conclusion that title passed to MCLP or the Liquidating Trustee at any time.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER APPOINTING TRUSTEE

On August 8, 1985 the Court entered an order confirming the Amended Consolidated Plan of Reorganization proposed by the Bank of New York (the "Bank's Plan"). Article V of the Plan contemplates the establishment of a liquidating trust and the appointment of a Trustee for all property of the debtors.

The Bank of New York has nominated Fred Stanton Smith to serve as trustee under the Bank's Plan. In accordance with the discussions among counsel in open Court on August 8, Mr. Smith has been introduced to counsel for the debtors and Olympia & York.

In the interest of assuring an orderly transition from the debtors-in-possession to the Trustee, it is hereby ORDERED that:

1. Fred Stanton Smith is hereby appointed as Trustee for purposes of the Bank's Plan.

2. Since motions for rehearing are anticipated and will not be heard until next month, for the time being:

(a) the Trustee's compensation and expenses shall be borne by the Bank;

(b) The Trustee shall not assume title to, and possession and control of the debtors' property and affairs as contemplated by the Bank's Plan until such time, if any, as the motions for rehearing on the confirmation order have been heard and determined; in the interim, the Trustee and his representatives shall have the power and right:

(1) Upon notice to the debtors-in-possession, to enter upon and inspect the debtors' premises in order to become familiar with debtors' operations, including, without limitation, the Miami Center buildings and operations;

(2) Review and copy all books and records of the debtors and their respective subsidiaries, including all records, relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data;

(3) Discuss the affairs and business operations of the debtors and their respective subsidiaries with the officers, directors, employees, attorneys, accountants, agents, tenants, subtenants, of such entities in order to gain a thorough understanding of such affairs and operations; and

(4) Engage attorneys, accountants, and such further consultants as he may deem appropriate, providing notice of such retention to parties in interest, for the

purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries.

3. On or before the date the Trustee assumes possession and control of the debtor's property and affairs pursuant to the Plan, the Trustee shall:

(a) File with the Court and serve upon all parties in interest a written statement describing the proposed basis for his compensation as Trustee and the identity of, and proposed compensation for, such attorneys, accountants, and consultants as have been retained by him. No compensation shall be payable to the Trustee or to any such attorney, accountant, or consultant from the assets of the debtors' estates until the Court has reviewed and heard any objections to such proposed compensation arrangements.

(b) Post a Trustee's bond in the amount of $1,000,000.00 in form approved by the Court. All payments of claims by the Trustee shall be approved by Court order.

DONE AND ORDERED at Miami, Florida, this 12 day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: Counsel and Parties per
Attached Service List

APPENDIX L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical pians. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B.R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better.

The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtor's debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditor's committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures

the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29.

(C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b) (1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtor's plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

HOLYWELL CORPORATION, et al.
Debtors.

THE BANK OF NEW YORK,

Appellant,

vs

OLYMPIA & YORK FLORIDA EQUITY CORP., O & Y EQUITY CORP., THEODORE B. GOULD, and MIAMI CENTER JOINT VENTURE,

Appellees.

No. 85-3430-Civ-ATKINS

MEMORANDUM OPINION
(Filed June 23, 1986)

Appellant, The Bank of New York, seeks reversal of a final judgment and related orders of the Bankruptcy Court in an adversary proceedings, holding that certain lease agreements relating to furniture, fixtures, and equipment ("FF&E") within the Miami Center project, were "true leases." Having determined the bankruptcy Court (a) correctly found the agreements were true leases and (b) not to be clearly erroneous in its findings, I affirm.

Relevant Facts

The appellee, Miami Center Joint Venture ("NCJV"), is a Florida general partnership formed by appellees

Gould and Olympia & York Florida Equity Corp. ("O&Y Florida").

O&Y Florida supplied funds to MCJV for purchase of furniture, fixtures and equipment ("FF&E") required to be installed in the hotel premises of MCJV to make the hotel operable. The FF&E was the subject of two lease agreements executed between MCJV and Miami Center Limited Partnership ("MCLP")

At the closing of the hotel project on May 14, 1981, the appellant, as the first mortgagee of the MCLP property, approved and confirmed the leases in form and substance and gave its approval in writing. It was not until the recent adversary proceedings that the bank challenged the structure and terms of the leases.

The Bank's Contention

The Bank urges two arguments in its appeal. It asserts (1) the Lease Agreements are not "true leases" but are security agreements and (2) "the Bankruptcy Court found and relied upon three critical findings of fact which are clearly erroneous and which require reversal of the judgment below."

The Leases at Issue

The leases recited that the Lessor "hereby leases to Lessee, and Lessee hereby rents from Lessor" the FF&E to be so acquired and purchased by Lessor.

The Lease Agreements further provided:

> Title to each item of Equipment leased hereunder shall remain with the Lessor at all times

and Lessee shall have no right, title or interest therein except as expressly set forth in this lease. Lessee, at its expense, will protect and defend Lessor's title to the Equipment and will keep the Equipment free and clear from any and all liens, encumbrances and legal process of Lessee's creditors and other persons.

* * *

All items of Equipment shall at all times be and remain personal property notwithstanding that any such Equipment may now or hereafter be affixed to realty."

The Purchase Option provisions of the Leases (para. 18) require payment of fair market value or an alternate rental and amorization formula, as a floor, whichever is *higher.*

Paragraphs 23-24 provide that on any event or events of default which include non-payment of rentals when due, or insolvency, or appointment of a receiver or proceedings in bankruptcy, the Lessor may declare all unpaid rentals immediately due and payable (together with accumulated late charges). The lessor may exercise Lessee's purchase option, on behalf of and as attorney-in-fact for Lessee. Lessee also irrevocably appoints Lessor its attorney-in-fact with full power and authority to exercise such option on its behalf. The Lessor is accorded the right to recover all unpaid rental and charges in addition to the above purchase option price.

The Bank's Conduct

The Bank gave its approval of the protective provisions of the Leases that would assure MCJV's priority rights as owner and trustee.

At the closing in 1981, the Bank sought and obtained from MCJV a subordination of its owner's rights in the FF&E to the Bank's first mortgage lien.

It was agreed that only the FF&E under the *Category A Lease* would be subordinated, but only to the then agreed and existent principal amount of the construction loan ($89 million). The Bank accepted and acceded to the full subordination of its entire first mortgage lien to the MCJV ownership position on the *Category B Lease* of FF&E Appellant Bank clearly recognized the priority ownership/lessor status of the MCJV as to the FF&E under both leases.

The Bank filed the UCC-1 forms reflecting and recording priority rights of MCJV as owner. Such rights were superior to those of the bank as well as to general and unsecured creditors.

The Bank's initial Consolidated Disclosure Statement and Plan of Reorganization filed February 27, 1985, and its Amended Consolidated Plan of Reorganization filed March 26, 1985, provided for a Liquidating Trustee. The latter would exercise the option price of Leases A and B and thus be in a position to transfer title to the MCJV FF&E to the Bank. The Bank's Amended Consolidated Disclosure Statement and plan provided, *inter alia*, "The trustee shall be required to:

> "(iii) Take all steps and make all payment from such cash (and, if necessary, from the Washington proceeds,) to exercise the purchase option in the MCJV FF&E leases and to obtain title to the FF&E [sic] covered by the MCJV leases."

The Bank received bank Letters of Credit in its favor in the combined amount of $7,775,000 to assure that FF&E would be purchased the provided under the leases. The Bank made certain that the O&Y advances for purchase of FF&E for the hotel was received and expended for that purpose. After the Bank was satisfied as to the FF&E items purchased for installation in mortgaged hotel, the Bank released O&Y's letter of credit.

O&Y and MCJV objected to the Bank's disclosure statements and amended proposed plan. It did so because of the low option price ($2 million instead of $7,745,000). The latter sum was the market value appraised by MCJV in the ancillary proceedings plus the omission of defaulted rental and late charges of $6,672,679. Thereupon, the Bank filed its Motion for Evaluation of Claims of, and Security Held by MCJV and O&Y. The court ruled that such motion would not be considered and was more properly the subject of an adversary proceeding. The Bank then filed its Adversary Proceeding "To Determine Validity, Priority or Extent of Lien or other Interest of MCJV/O&Y claimants."

The Memorandum Decision

The Bankruptcy Court found that (1) the purchase price upon exercise of the option by MCLP under the two agreements was not "Nominal" and (2) Metropolitan Life Insurance Company (originally the projects permanent

lender) insisted that the FF&E be leased and that the FF&E be free of any security interest. In the Memorandum Decision, Judge Britton also held:

> Until this action was filed six weeks ago, no one has suggested that the leases are not true leases any time during the four years they have been in existence. Indeed, the bank's disclosure statement supporting its plan describes and treats the leases as leases, not as disguised conditional sales.
>
> Neither the history nor the form of the documents, the direct testimony of the parties as to their intent, nor the contemporaneous acts of the parties support the bank's contention that the parties intended a conditional sale rather than a true lease. It is the bank's argument that the terms of the leases compel the conclusion that the parties in fact intended a conditional sale.
>
> Florida law is controlling here and the only reported case from a Florida court is *U.C. Leasing, Inc. v. Barnett Bank of West Florida*, 443 So.2d 384 (Fla. Dist. Ct. App. 1983). This decision affirmed a trial court's holding that a bank's perfected security interest in certain equipment was superior to a purported lessor's claim which had not been recorded as a security agreement. The trial court found the equipment lease to be not a "true lease" but rather a "secured transaction."
>
> In this reported decision, neither the lessor nor the bank stood to gain a windfall. Each was the innocent victim of a merchant who executed separate inconsistent agreements, first to lease from the lessor to pledge the leased equipment to the bank for a loan.
>
> Neither this decision nor any I have seen applied UCC § 1-201 (37) where the result is to

give one party a windfall at the expense of an innocent party. The legislative purpose was to protect the lessee's other creditors from fraud and deception. There is nothing in the record before me that suggests that anyone was misled or deceived by the leases in question here. Certainly the bank was not misled or deceived in any way.

> UCC § 1-102(1), *Fla. Stat.* § 671.102(1), requires that:
>
> "This code shall be liberally construed and applied to promote its underlying purposes and policies."

To construe and apply the code to produce the result urged here by the bank would defeat the purpose and policy of the code. It is a shield, not a sword.

Furthermore, the Florida court identified certain features of the transaction before it which prompted its conclusion at least four of which are absent in our case.

1. There, the option price given the lessee to acquire title was "nominal" about 10% of the initial price. In our case the option price is *the greater of the unrecovered original cost or the market value* at the time the option is exercised. The only evidence of market value is an appraisal eight months ago of $7.7 million, 99% of the purchase price. I find that plaintiff has failed to carry its burden of showing that the option price would be "nominal" at any time during the 60-month life of these leases.

2. There, the initial payments, monthly payments, and option prices were readily equated to the current rate of interest and the lessor admitted that the payments were determined by and related to the cost of funds and interest

rates. Of course, every lessor must consider and try to recoup its investment, but in our case, there was no down payment, no such congruency, and no such admission as was before the Florida court. We have two leases executed on the same day involving the same kind of property, but which produce two different rates of return for the lessor.

3. There, the lessor required a guaranty of payment. There is none here.

4. There, the lessee was granted the investment tax credit. Here, the lease gives it to the lessor which has used it.

U. C. Leasing, therefore, is readily distinguishable from the case before this court.

In *American Standard Credit*, the Fifth Circuit reversed the district court's holding that the equipment lease in question there was not a true lease. The seven factors which the court found to be crucial to its conclusion are each paralleled here. *Id.* at 266.

The FF&E Leases are True Leases

In determining whether a lease is a "true lease" or a lease intended as a security, "foremost is the express manifestation of the parties' intent in the lease itself." *American Standard Credit v. National Cement Co.*, 643 F.2d at 266 (5th Cir. 1981).

The leases are replete with language evidencing the parties' intent that they be true leases. The lease provision, delineating the procedure for drawings under the letters of credit issued to it, recites:

> . . . [t]he proceeds of the sight drafts will be solely used to purchase furniture, fixtures and

> equipment for the Site, as hereinafter defined, title to which furniture, fixtures and equipment shall be vested in Lessor . . . .

As if to avoid the contention now made by the Bank, the lease provided that in the event the Lessor were to record the Leases or make any filing, it was agreed that such acts "shall not be deemed evidence of any intent to create a security interest under the Uniform Commercial Code."

Whenever MCLP received drawings under the letters of credit, it was required to sign a statement containing the above recital limiting use of the proceeds to the purchase of FF&E for the hotel and that title shall be vested in MCJV.

The Bank recognized MCJV's priority ownership rights in demanding a subordination of those rights to the Bank's mortgage lien.

Other indicia of the intent to treat the leases as true leases included:

(1) Approval by the Bank of the form and substance of Leases in writing at the Joint Venture Closing;

(2) The absence of any provision in the leases granting the Lessee an equity or property interest;

(3) The express provision in the leases that title remained in the Lessor;

(4) The right of the Lessor to obtain investment tax benefits under the lease which MCJV reported on its tax information returns as owner;

(5) The right of the Lessor to grant a security interest in the equipment without notice to the Lessee as recited in paragraph 2:

> For the purpose of providing funds for financing of the Equipment, of for any other purpose, Lessee agrees (a) that Lessor may assign, sell or encumber all or any part of this lease, the Equipment and the rental payments hereunder . . . .

(6) The purchase option price was not nominal (here the purchase option was to be the greater of the fair market value or the unamortized principal balance as of the date of the purchase).

(7) If the option to purchase is not exercised MCLP had an obligation to return the leased items.

(8) The leases provided that no title or right passed to the Lessee and title and ownership of the equipment remained in the Lessor.

Conclusion

As the appellant concedes, it must demonstrate the Bankruptcy Court's findings of fact are "clearly erroneous" to require reversal or modification. The appellant has not met that burden.

AFFIRMED.

DONE AND ORDERED at Miami, Florida, this 23 day of June, 1986.

/s/ C. Clyde Atkins
UNITED STATES
DISTRICT JUDGE

cc: John W. Kozyak, Esq.
Fred H. Kent, Jr., Esq.
Scott D. Sheftall, Esq.
Raymond W. Bergan, Esq.
Vance E. Salter, Esq.
Harvey Ziegler, Esq.
Thomas F. Noone, Esq.
Irving M. Wolff, Esq.
Albert Edelman, Esq.

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 85-3230-Civ-Atkins

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,
Appellants,

VS.

THE BANK OF NEW YORK,
Appellee.

MEMORANDUM OPINION

Appellants, Olympia & York Florida Equity Corp. ("O&Y") and O&Y as general partner and on behalf of Miami Center Joint Venture ("MCJV"), seek reversal of the Confirmation Order approving the Bank of New York's modified plan which subordinates appellants' claims to the payment of all other unaffiliated creditors. After reviewing the confirmation order and the record, I find that the bankruptcy court failed to provide the findings of fact necessary to support its conclusions. Without this information, I cannot adequately review and decide the issues on appeal. Thus, I must remand the case for further determination not inconsistent with this order.

Statement of the Case

The debtors, who are not parties to this appeal, initiated the underlying bankruptcy proceedings under Chapter 11 on August 22, 1984. The appellants, Olympia & York Florida Equity Corp. ("O&Y") and O&Y as general partner and on behalf of Miami Center Joint Venture ("MCJV"), had transactions with two of the debtors – Mr. Theodore B. Gould ("Gould") and the Miami Center Limited Partnership ("MCLP").

O&Y/MCJV's claims are against MCLP for which Gould and Miami Center Corporation ("MCC") are also obligated as the general partners of MCLP. Appellants claim is founded upon the FF&E lease agreements (Leases "A" and "B") in which MCJV purchased the furniture, fixtures, and equipment necessary for the operation of MCLP's hotel with funds advanced to MCJV by O&Y. In turn, MCJV leased the FF&E MCLP under the terms and conditions of the lease agreements.[1]

Appellant O&Y's claims are against Gould. These claims relate to Gould's obligations to O&Y as general partner in the MCJV joint venture partnership. Currently, MCJV owes O&Y in excess of 60 million dollars. Since Gould is a general partner, he is a guarantor of MCJV's debt to O&Y.

The Bank of New York ("Bank"), appellee, was the largest creditor of the debtors holdings claims in excess of

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[1] These lease agreements were found to be "true leases" by the bankruptcy court in its June 24, 1985 Memorandum Decision which was recently affirmed by this Court.

240 million dollars. The Bank formulated a single substantively consolidated plan which, as amended, consists of the following principle features.

(a) The Bank acquired the Miami Center project, *including the FF&E,* for its MAI-appraised fair market value of $255,600,000. That purchase price included (1) a credit for outstanding principal and interest with interest computed at the lower, "good standing" rate and (2) cash for the balance after giving effect to customary prorations and closing expenses.

(b) The net cash proceeds of the sale, together with the Bank's cash collateral of approximately $30,000,000 and the debtor's other remaining assets, were turned over to a "Liquidating Trustee," for the payment of all allowed claims.

(c) The Bank agreed to provide $14,417,679 for payment by the Liquidating Trustee to O&Y and/or MCJV, in the event that they prevail in amount and classification of their FF&E claims. (This agreement is now backed by a 15 million dollar Corporate surety bond.) This provision was required because the appellants objected to the subordination of their claims to class 7 which is below the claims of general and unsecured creditors.

Pursuant to the bankruptcy court's orders, the confirmation hearing for the Bank's Consolidated Plan and the debtors' Plans[2] was scheduled for April 29, 1985. However, because of the number of objections filed by

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[2] The debtor's plans were rejected by the creditors and by the bankruptcy court.

various creditors, the court deferred holding a confirmation hearing on the plans until the proponents assessed and certified the creditors votes for the various plans, and the clerk's office certified the vote. No confirmation hearing was held on objections to the Bank's plan. Similarly, no hearing was held on the issues of subordination or classification of appellant's claims and interest, and no opinion was rendered regarding the subordinate classification of O&Y/MCJV's lease claims in spite of the adjudication of their status as owners/lessors of the FF&E. Finally, no hearing was held regarding debtors' and OBY [sic]/MCJV's objection that the Bank's plan was not fair and equitable.

The Bank and the Unsecured Creditors Committee of the debtors negotiated a series of four stipulations. These stipulations were designed to satisfy the creditors and had the effect of amending the plan. The bankruptcy court approved the stipulations in its Confirmation Order without holding a hearing or ordering separate disclosure statements.

The Bank filed a Second Amendment to its plan which attempted to alleviate problems with the subordination of the MCJV lease claim by agreeing to pay the claim if subordination was found to be improper. O&Y/MCJV objected to the terms of the amendment. Nevertheless, the court approved it without holding a hearing or requiring a new disclosure statement.

Judge Britton entered the Confirmation Order on August 8, 1985. In it he stated:

> I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as

> modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129 (b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

However, the court never articulated the basis for subordinating appellants' claims to the payment of all other unaffiliated creditors. The court did state, "[t]he circumstances do not require and time simply does not permit a review and discussion of all these issues in this order."

The Scope of Review and Necessity of Adequate Findings of Fact and Conclusions of Law

It is well settled that a district court must accord substantial deference to the bankruptcy court's findings of fact, reversing these only when they are "clearly erroneous." In Re *Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. *In Re Multiponics*, 622 F.2d 709, 712 (5th Cir. 1980). Yet, case law suggests that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. *See Watson v. Thompson*, 456 F. Supp. 432, 436 (S.D. Ga. 1978). Furthermore, the district court may make its own findings of fact, provided that there is

no dispute as to the underlying facts. *See, e.g., In Re Neis,* 723 F.2d 584, 589 (7th Cir. 1983).

In a related matter, Judge Aronovitz discussed the importance of the trial court's findings of fact and conclusions of law.

> The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceedings below and the basis for the trial court's ruling, but it ensures that trial courts engage in a carefully reasoned analysis of each case. The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed. R. Bankr. P.* 7052, which requires the bankruptcy court to enter findings of fact and conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation at issue here were *adversary* proceedings as that term is defined in *Fed. R. Bankr. P.* 7001. These hearings below were "contested" matters as hereinafter defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed. R. Civ. P.* 52(a) are nonetheless applicable to the instant appeal.
>
> *Fed. R. Bankr. P.* 9014 extends the application of Rule 7052 to "contested matters." The appellants' objection to the final order of confirmation is explicitly made subject to Rule 9014 by *Fed. R. Bankr. P.* 3020(b). Thus, the Bankruptcy Judge should have made and entered clear and concise

> findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review.

Holywell Corp. v. Bank of New York, No. 85-3225 (S.D. Fla. Dec. 30, 1985) (order of remand) (footnotes omitted) (citations omitted).

Judge Aronovitz proceeded to examine the issues raised on appeal. Many of the issues he addressed are similar to those presented here. For example, both appeals involve the following:

(a) The doctrine of equitable subordination;

(b) the need for a valuation hearing;

(c) the unfair discrimination of similarly situated creditors under the plan or reorganization; and

(d) whether the bankruptcy court denied the parties due process by refusing their requests for hearings and disclosure of amendments to the plan.

He stated, "this Court has been left with the impeded, if not impossible, task of trying to apply a 'clearly erroneous' standard of review to findings of fact that are either non-existent or too vague to support adequate review." *Id.* at 8. Concerning the confirmation order, Judge Aronovitz noted:

> In the bankruptcy court's order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it

> does, significant rights and interests of creditors and debtors alike. . . .
>
> In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these orders was required.
>
> * * *
>
> It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court.

Id. at 9-11.

In the present appeal, I find myself in agreement with Judge Aronovitz. In fact, with respect to the lease claims, the appellant's position is particularly compelling. The bankruptcy court found that they were "true lease" holders. Moreover, the record indicates that the Bank filed the relevant UCC-1 forms reflecting and recording certain priority rights. Further, the Bank's counsel conceded the extreme importance of the subordinate classification of the lease claims.

> Treatment of the FF&E/lease claims and the classification of the in Class 7 and the decision that those claims are insider claims and should go behind the payments to the general unsecured creditors, the non-insider creditors, I would say that is the lynch pin of the plan.

[Court paper #800 at p. 24].

In short, in view of the importance of the issues on appeal and the conflicting evidence contained within the record, a more detailed discussion of the law and facts is required for an adequate review.

Conclusion

Judge Britton faced an extremely difficult task in handling this bankruptcy proceeding. The bankruptcy court dedicated a year to this matter. He considered over 1,000 pleadings and reams of evidence for the adversary proceedings. He had to consider the interests of over 400 parties. Most significantly the court was aware of the importance of resolving the matter quickly. Judge Britton knew that substantial interest was accruing on the $200 million construction loan which jeopardized the collectability of the claims of all creditors. While I believe that Judge Britton probably has a sound basis for his conclusion, it is regrettable that he did not convey this information in his confirmation order.

Therefore, it is

ORDERED AND ADJUDGED that this cause is *remanded* to the United States Bankruptcy Court for the Southern District of Florida, to hold further adversarial hearings and to enter such findings of fact and conclusions of law as are necessary to provide this court with an adequate basis to resolve this appeal. This should be accomplished within sixty (60) days from the file stamp date of this order.

DONE AND ORDERED at Miami, Florida, this 30th day of June, 1986.

/s/ Clyde Atkins
United States District Judge

cc: All counsel & parties of record
Honorable Thomas Britton

APPENDIX O

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 878-13348

MIAMI CENTER JOINT VENTURE, a general partnership, and OLYMPIA & YORK FLORIDA EQUITY CORP. and THEODORE B. GOULD, as its general partners,	FLA. BAR NO. 321184
Plaintiff,	*COMPLAINT*
v.	
CITY NATIONAL BANK OF MIAMI, a national banking association, as Trustee, and M.C. HOLDINGS PARTNERS, a New York general partnership, and ROBANK CORP., H.D. LIQUIDATION INC., ZENTAC INVESTMENTS INC., BOTT FLORIDA HOLDING CORP., AMERICAN SECURITY LTD., M CENTER CORPORATION, its general partners	
Defendants.	

Plaintiffs, Miami Center Joint Venture and Olympia & York Florida Equity Corp. and Theodore B. Gould, as general partners of Miami Center Joint Venture, sue Defendants, City National Bank of Miami, as Trustee, and M.C. Holdings Partners, and Robank Corp., H.D. Liquidation Inc., Zentac Investments Inc., BOTT Florida Holding Corp., American Security Ltd., M Center Corporation, general partners of M.C. Holdings Partners and state as follows:

1. This is an action for replevin of property located in Dade County, Florida and for damages from conversion, civil theft and breach of contract, in excess of $5,000.00.

2. Plaintiff, Miami Center Joint Venture, is a general partnership organized under the laws of the State of Florida and is the owner of the property which is the subject matter of this action. Plaintiffs, Olympia & York Florida Equity Corp. and Theodore B. Gould are the general partners of Miami Center Joint Venture, and Olympia & York Florida Equity Corp. is managing partner.

3. Defendant City National Bank of Miami is a national banking association.

4. Upon information and belief, defendant M.C. Holdings Partners is a general partnership whose partners are defendants Robank Corp., a wholly owned subsidiary of Bank of New York; H.D. Liquidation Inc., a wholly owned subsidiary of Irving Trust; Zentac Investments Inc., a wholly owned subsidiary of Security Pacific National Bank; BOTT Florida Holding Corp., a wholly owned subsidary of Bank of Tokyo Trust Company;

American Security Ltd., a wholly owned subsidiary of American Security Bank N.A.; and M. Center Corporation, a wholly owned subsidiary of the Electrical Workers Benefit Association.

5. Defendant City National Bank of Miami, as trustee for M.C. Holdings Partners, is currently in possession of the property which is the subject matter of this action.

6. On or about May 14, 1981, Plaintiff entered into two lease agreements (hereinafter referred to as the "Lease Agreements") with Miami Center Limited Partnership. Miami Center Limited Partnership at that time, and continuing until October 10, 1985, was the owner of certain improvements to real property located on Chopin Plaza in Dade County, Florida comprised of the Pavillon Hotel, presently named the Hotel Inter-Continental, the Edward Ball Office Building and a connecting Podium structure (hereinafter referred to as the "Miami Center Complex"). True and correct copies of said Lease Agreements are attached hereto as Exhibits A and B.

7. Pursuant to said Lease Agreements, Plaintiff agreed to purchase, and did in fact purchase, $7,775,000 of furniture, fixtures and equipment (hereinafter referred to as "Property") to be used in the operation of the Miami Center Complex, and leased said Property to the Miami Center Limited Partnership at a monthly rental of $195,281.25.

8. The Property consists of the following:

Carpet Shampoo Machines
Bakery Utensils
Slvrpltd Fltwre & Hllwre

Stainless/Silverplat Holloware
Linen Tablecloths & Napkins
Silverplated Carrying Trays
Kitchen Equip.
Banquet Tables
Hotel Cookware
Silvr/Chna/Glass Racks
Recipe Card Holders
Suite Refrigerators
Linens, Towels, Mattress Pads
Placemats/Palm Court
Guest Room Shower Curtain Liner
Bakery Utensils
Hotel Ice Buckets
Lamps
Lockers & Benches
Upholstery
Guest Rm Shower Curtains
Apparel & Upholstery Steamer
Hotel Drapes/Bedspread/Dustruffl
Steward Equip
Mobile Guest Luggage Carry Eq
Bakery Utensils
Hotel Bed Comforters
Conduit/Beverage Lines
Housekeeping Towels
Silverware Racks/Empl Lockers
Glassware (Rest)
Hotel & Bar Glassware
Silverware Racks/Stewarding
China Dishware-Hotel
Panel Mits/Elctrcl Connctrs
Data & Telecom Center
Hotel Safe & Lock Boxes
Instln-Reinfrcng Stl Plates
Keypad Security
Guestrm Lockset Security
Coax Cable/Pwr Blk & Termntr
Electric Door Strikes
Filter Ntwk for CATV
Assorted Telecom Equipment

Reliax/Heliax Cable
Amplfrs/Couplrs/Coaxial Cable
Labor Control System
Antennae Twr & Conduit
Additional Equipment consisting of:

1 – Off-air receiving system – master antennae system

- 1 – Antennae tower and supports
- 4 – Receiving antennae
- 6 – Base band demodulators

1 – Earth station system – cable antennae system

- 2 – 7 metor motorized antennae
- 16 – 4 GHZ receivers
- 1 – "Lot" LNA's

1 – Head end system – Master antennae/cable antennae system

- 31 – Trunk modulators
- 2 – Combining amplifiers
- 1 – "Lot" equipment racks
- 1 – "Lot" audio-video patch panels

1 – Hotel-Podium distribution system

- 1 – Trunk amplifier
- 26 – Line extender amplifiers
- 2 – Power supplies
- 1 – "Lot" splitters – taps – couplers

1 – Loctronic security – information – control system

- 713 – Hotel room LT units
- 43 – Podium LT units

1 – "Lot" central CPU and peripherals
1 – Central dial in processor
1 – System software

1 – Local origination system

4 – TV monitors
1 – "Lot" protection room trunk
1 – "Lot" rack mounts
1 – "Lot" modulators (part of head end system)

1 – Close circuit TV security system

10 – TV cameras and mounts
5 – Video monitors
1 – Video switcher with automatic scan
15 – Time lapse VCR units
1 – "Lot" control console

Linen closet security and monitor system

29 – LT units
29 – Monitors

1 – Access control gates

2 – Automatic gate control and gate arm
2 – Loop detectors

1 – Air handling unit/NEAX interface system
1 – Baggage – room – valet remote printer and software update
1 – Baggage valet, room service menu, maid reports, housekeeping reports, software update
1 – Remote terminal and printer for housekeeping and made
2 – Loctronic remote terminals at PBX

1 – PBX (concierge software name/room number)
1 – Expand NEAX interface for 36 processor slots and
24 processors
1 – Auto valet remote terminal and printer
1 – Concierge remote terminal and printer
1 – Concierge message and valet terminal software
1 – Life safety software
1 – Time and attendance system

4 – Stations
1 – "Lot" software

1 – Back-up common alarm interface/printer/software
1 – "Lot" labor, engineering, miscellaneous hardware and cable to complete system installation

9. Bank of New York, Irving Trust Company, Security Pacific National Bank, Bank of Tokyo Trust Company, American Security Bank NA, and the Electrical Workers Benefit Association, through the Bank of New York as lead bank, advanced loans to Miami Center Limited Partnership for the purpose of constructing the Miami Center Complex.

10. On or about May 14, 1981, the Bank of New York, as lead bank for the construction lenders, reviewed and approved the terms of the aforesaid leases between Plaintiff and Miami Center Limited Partnership.

11. On or about March 1, 1983, all of the aforementioned Property was delivered to the Miami Center Complex and, to the best of Plaintiff's knowledge, has remained there to date.

12. Said leases were to continue for a period of five (5) years from the date of delivery of the Property. At the end of the term of the leases, Miami Center Limited Partnership was to return the leased Property to Plaintiff.

13. On or about August 22, 1984, Miami Center Limited Partnership filed a voluntary petition for reorganization pursuant to Chapter 11 of the United States Bankruptcy Code. On October 10, 1985, pursuant to said reorganization proceedings, Defendants purchased and entered into possession of the Miami Center Complex.

14. On or about June 24, 1985, in connection with the aforesaid reorganization proceedings, the aforesaid Lease Agreements were determined to be, in fact, "true leases", with title and ownership of said Property residing in Plaintiff. Said determination was affirmed by the United States District Court, Southern District of Florida on or about June 23, 1986. A copy of said District Court decision is attached hereto as Exhibit C.

15. On October 10, 1985, defendants purchased and entered into possession of the Miami Center Complex, and since said date, with full knowledge of Plaintiff's ownership of said Property, Defendants have retained Plaintiff's Property and have reaped substantial benefits from the use of said Property in their operation of the Miami Center complex, but have failed and refused to make rental payments therefore. Defendants likewise have failed and refused to make payment of the cumulative defaulted rentals and late charges which they were required to cure as a condition of taking possession of said Property and making use thereof.

16. Since October 10, 1985, Plaintiff has repeatedly demanded return of its Property, or payment of its fair market value, and rental payments for the period of time during which Defendants have wrongfully retained the Property. Defendants have failed and refused to meet any of said demands.

17. Plaintiff has been damaged and continues to be damaged by Defendants' wrongful retention of the Property.

18. Upon information and belief, Defendants are in active and advanced negotiations to sell Plaintiff's Property to an independent third party, as part of and together with the sale of the Miami Center Complex, in which Plaintiff's Property is installed and affixed.

19. Paragraph 24 of the Lease Agreements provides, in pertinent part,

> "Upon the occurrence of any Event of Default and at any time thereafter (subject to any applicable grace provisions), Lessor may without any further notice exercise one or more of the following remedies . . . take possession of the Equipment wherever found, and for this purpose enter upon any premises of Lessee and remove the Equipment . . . "

COUNT I
REPLEVIN

20. This is an action to recover possession of personal property located in Dade County, Florida.

21. Plaintiff realleges and adopts paragraphs 6-19 above.

22. To the best of Plaintiff's knowledge, information and belief, the value of the Property is in excess of $7,700,000 with replacement costs significantly in excess of said amount.

23. Plaintiff is the owner of the Property which was purchased by Plaintiff pursuant to paragraph 1 of both of the agreements attached hereto as Exhibits A and B.

24. To Plaintiff's best knowledge, information and belief, the property is located in the Miami Center Complex, at Chopin Plaza, Miami, Florida 33131.

25. The Property is wrongfully detained by Defendants, who came into possession of the property on or about October 10, 1985, when they took possession of the Miami Center Complex, where the Property is located.

26. Defendants have made use of and exercised dominion and control over the Property and have wrongfully asserted title thereto and have refused to account for the Property upon proper demand by Plaintiff.

27. The Property has not been taken for any tax, assessment or fine pursuant to law.

28. The Property has not been taken under an execution or attachment against Plaintiff's property.

29. By reason of Defendants' wrongful detention of the Property, without just and proper compensation to Plaintiff, Defendants have been unjustly enriched and Plaintiff has been damaged to the extent of cumulative defaulted rentals and late charges and accelerated rentals as alleged above.

WHEREFORE, Plaintiff demands issuance of a writ of replevin for the Property prior to final judgment, and demands judgment for possession of the Property, and for damages, costs and for such other and further relief as this Court may deem proper.

COUNT II
CONVERSION

30. This is a claim for damages from Defendants' conversion of Plaintiff's Property.

31. Plaintiff realleges and adopts paragraphs 6 through 18 inclusive.

32. Plaintiff is entitled to possession of the Property pursuant to its title thereto and the default under the lease agreements covering said Property.

33. Defendants have wrongfully retained said Property since October 10, 1985 and have exercised dominion over said Property and have converted said Property to Defendants' own use.

34. To the best of Plaintiff's knowledge, the value of said Property at the time of Defendants' wrongful conversion was in excess of $7,700,000, exclusive of defaulted rental and late charges, and other contractual damages.

WHEREFORE, Plaintiff demands judgment for compensatory damages, punitive damages, and for such other and further relief as this Court deems proper.

COUNT III
BREACH OF LEASE AGREEMENTS

35. This is an action for damages resulting from Defendants' breach of the Lease Agreements attached hereto as Exhibits A and B.

36. Plaintiff realleges paragraphs 6 through 19 inclusive.

37. Prior to October 10, 1985, Defendants had full knowledge of Plaintiff's title to and ownership of said Property and of the Lease Agreements pursuant to which said Property was leased and installed in the Miami Center Complex, and of the aforesaid adjudication of such title and ownership, and of the validity and effectiveness of said Lease Agreements, and were fully aware that said leases were in default in the respects and amounts herein alleged.

38. By Defendants' taking and continued retention and use of the Property, Defendants have assumed the obligations imposed upon the lessee under the terms of the aforesaid Legal Agreements.

39. Defendants have breached said Lease Agreements and entered into default thereunder in that:

(a) Defendants have failed to make the requisite rental payments provided therein;

(b) Defendants have failed to maintain insurance payable to Plaintiff;

(c) Defendants have removed or caused to be removed certain of the Property;

(d) Defendants have altered certain of the Property without the consent of Plaintiff;

(e) Defendants have permitted or caused the loss, theft, damage or destruction of certain of the Property.

40. As a result of Defendants' default and pursuant to said Lease Agreements, Plaintiff is entitled to recover from Defendants defaulted rentals rent from March 1, 1983 to October 10, 1985 in the amount of $6,249,000; defaulted rentals from October 10, 1985 to February 28, 1987 in the amount of $3,124,500; late charges from March 1, 1983 to February 28, 1987 in the amount of $2,573,357; accelerated rent from February 28, 1987 to February 28, 1988 in the amount of $2,343,375; liquidated damages, attorneys fees and court costs.

WHEREFORE, Plaintiff demands judgment for compensatory damages, attorneys fees, and such other and further relief as this Court deems proper.

SHUTTS & BOWEN
Attorneys for Plaintiff
1500 Edward Ball Building
100 Chopin Plaza
Miami Center
Miami, Florida 33131
Tel. (305) 358-6300

By: /s/ Sally M. Richardson
Sally M. Richardson

By: /s/ Barbara E. Vicevich
Barbara E. Vicevich, P.A.

ALBERT I. EDELMAN, P.C.
Co-Counsel for Plaintiff
100 Park Avenue
26th Floor
New York, New York 10017
Tel. (212) 972-6088

By: _____

APPENDIX P

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, AND THEODORE B. GOULD,

Debtors,

MIAMI CENTER JOINT VENTURE, OLYMPIA & YORK FLORIDA EQUITY CORPORATION and THEODORE B. GOULD

Plaintiffs,

vs.

CITY NATIONAL BANKOF MIAMI, M. C. HOLDINGS PARTNERS, ROBANK CORPORATION, H.D. LIQUIDATING INC., ZENTAC INVESTMENTS INC., BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY LIMITED, M. CENTER CORPORATION,

Defendants.
_____/

Removed Circuit Court
Case No. 87-13348

ORDER CONFIRMING REMOVAL OF CIVIL ACTION TO THE BANKRUPTCY COURT AND DISMISSING COMPLAINT THEREIN WITHOUT PREJUDICE

THIS MATTER having come on before the Court for hearing on May 4, 1987, upon Defendants' Application for Removal of Civil Action to the Bankruptcy Court, pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027, and the Court having reviewed and given due consideration to the content of said Application, having heard argument of counsel, having reviewed the file, and being otherwise duly advised in the premises, does hereby

ORDER AND ADJUDGE:

1. The above-styled action pending in the Circuit Court of the 11th Judicial Circuit of Florida in and for Dade County, bearing docket no. 87-13348 and entitled *Miami Center Joint Venture, et al. v. City National Bank of Miami, et al.*, to be both removable and properly removed to this Court; and that

2. The Complaint in the above-styled action is dismissed without prejudice.

DONE AND ORDERED in Chambers, Miami Dade County, Florida, this 6th day of May, 1987.

THOMAS C. BRITTON

Thomas C. Britton
United States Bankruptcy Judge

Copies Furnished To:

Albert I. Edelman, Esq.
Sally M. Richardson, Esq.
Thomas F. Noone, Esq.
Vance E. Salter, Esq.
S. Harvey Ziegler, Esq.

APPENDIX Q

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF FLORIDA

MIAMI CENTER JOINT VENTURE, OLYMPIA & YORK FLORIDA EQUITY CORP., and THEODORE GOULD,
Appellants,

v.

CITY NATIONAL BANK OF FLORIDA, et al.,
Appellees.
_____/

CASE NO. 87-1237-CIV-ATKINS

ORDER DISMISSING APPEAL AS MOOT
(Filed April 8, 1988)

THIS CAUSE is before the court on the appellants' appeal of an order of the Bankruptcy Court dismissing appellants' lawsuit after removal. It is

ORDERED AND ADJUDGED that this appeal is dismissed as moot.

The appellants commenced an action in the state court for replevin and conversion. At issue was the ownership of the MCVJ FF&E. The action was removed to the Bankruptcy Court which dismissed. On April 4, 1988, this court affirmed the order of the Bankruptcy Court which found that the MCJV leases had been assumed and the purchase option exercised by the confirmed plan. Accordingly, the action brought by the appellants is rendered moot by that order and this appeal must be dismissed.

DONE AND ORDERED at Miami, Florida this 7th day of April, 1988.

/s/ Clyde Atkins
United States District Judge

cc: Vance Salter
Barbara Vicevich
Albert Edelman
John Kozyak
Herbert Stettin
Robert Mark

APPENDIX R

Relevant Constitutional and Statutory Provisions

1. Amendment V to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. 11 U.S.C. Section 1123(a)(5)(G) provides that "Notwithstanding otherwise applicable nonbankruptcy law, a plan shall – provide adequate means for the plan's implementation such as – curing or waiving of any default. . . ."

3. 11 U.S.C. Section 361(3) provides:

> "When adequate protection is required under Section 362, 363, or 364 of this title of any interest of an equity in property, such adequate protection may be provided by . . . granting such other relief, other than entitling such entity to compensation allowable under Section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property."

4. 11 U.S.C. Section 363(f) provides as follows:

"(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, *only if* –

(1) applicable nonbankruptcy law *permits* sale of such property free and clear of such interest;

(2) such entity *consents;*

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in *bona fide* dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

5. 11 U.S.C. Section 363(m) provides:

"(m) The reversal or modification on appeal of any authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."